Supreme Court, U.S.
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09-839 NOV 5 - 2009

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NO. _____

In The
Supreme Court of the United States

SYBLE HOQD
AND TOM H. WHITESIDE,
Petitioners,

v.

EDWARD D. JONES & Co., L.P.
AND ROBBY ROGERS,
Respondents.

On Petition For A Writ of Certiorari To The Eighth Court Of Appeals of Texas

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In this age discrimination case, did the Eighth Court of Appeals of Texas violate Due Process by denying Plaintiff Hood a meaningful opportunity to be heard when the trial court put her to trial and hearing despite refusing her well-founded discovery requests? The questions are:

1. Did the Court of Appeals violate Due Process in affirming the trial court's refusal to allow Plaintiff discovery of statistical data and defendant's own "inclusion" department's analyses which violates the Plaintiff's right to statistical information in an age discrimination case under *McDonnell Douglas Corp.v. Green*, 411 U.S. 804, (1973), *Smith v. City of Jackson*, 544 U.S. 228, (2005), *Deloach v. Delchamps, Inc.*, 897 F.2d 215, (5th Cir. 1990) and *Quantum Chemical Corporation v. Toennies*, 47 S.W.3d 482, (Tex. 2001)?
2. Was the Court of Appeals' refusal to require the Trial Court to examine Defendant's

allegedly privileged documents *in camera* and dismiss sanctions against Whiteside a denial of Due Process? Can courts require evidence of "bad faith" or subjective intent to defraud to warrant sanctions and on the other refuse to examine withheld documents *in camera* which would show whether bad faith actually occurred?

PARTIES TO THE PROCEEDING

The Petitioners are Syble Hood and Tom Whiteside.

The Respondents are Edward D. Jones & Co., L.P. and Robby Rogers.

TABLE OF CONTENTS

QUESTIONS PRESENTED.....ii

PARTIES TO THE PROCEEDING.....iv

TABLE OF AUTHORITIES.....vi

CASES.....vi

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES.....viii

OTHER AUTHORITIES.....viii

OPINIONS BELOW.....1

JURISDICTION.....1

CONSTITUTIONAL PROVISIONS INVOLVED.....2

STATEMENT.....2

A. Discharge of Hood and Replacement by Scott.....2

B. Request for Statistical Data of Discrimination and Inclusion Department.....3

C. Inclusion Department and Pertinence of Statistical Information.....7

D. Rogers' Motion for Summary Judgment.....11

E. Hood's Motion for Sanctions.....20

F. Hood's Mandamus to the Court of Appeals and Texas Supreme Court.....28

G. Trial Court Order Denying Hood's Motion for Sanctions and Granting Jones' Motion for Sanctions and Hood's Objection.....29

H. Court of Appeals Decisions.....29

REASONS FOR GRANTING THE PETITION.....31

I. Recent Decisions of the El Paso Court of Appeals and the Texas Supreme Court highlight the dual system of justice that exists in Texas. 31

II. Funding for the Texas Supreme Court has led to preferential treatment for donors.....37

III. Caperton vs. A.T. Massey Coal, Inc., 556 US ___, 129 S.Ct. 2252 (2009) reaffirms that justice is not for sale. 40

CONCLUSION.....42

APPENDIX

January 3, 2007 109th District Court of Andrews County Texas Final Judgment.....App. A

March 22, 2007 Court of Appeals for the Eighth District of Texas Judgment.....App. B

March 22, 2007 Court of Appeals for the Eighth District of Texas Memorandum Opinion on Petition for Writ of Mandamus.....App. C

June 1, 2007 Supreme Court of Texas Order Denying Petition for Mandamus.....App. D

July 27, 2007 Supreme Court of Texas Order Denying Motion for Rehearing.....App. E

October 23, 2007 109th District Court of Andrews County Texas Order Denying Plaintiff's Motion for Relief under TRCP 13 and TRCP 166a(h).....App. F

January 29, 2009 Court of Appeals for the Eighth District of Texas Opinion (No. 08-07-00324)...App. G

January 29, 2009 Court of Appeals for the Eighth District of Texas Opinion (No. 08-07-00093)...App. H

March 4, 2009 Court of Appeals for the Eighth District of Texas Order Denying Motion for Rehearing (No. 08-07-00324).....App. I

March 4, 2009 Court of Appeals for the Eighth District of Texas Order Denying Motion for Rehearing (No. 08-07-00093).....App. J

June 12, 2009 Supreme Court of Texas Order Denying Petition for Review (No. 08-07-00324).....App. K

June 12, 2009 Supreme Court of Texas Order Denying Petition for Review (No. 08-07-00093).....App. L

August 7, 2009 Supreme Court of Texas Order Denying Motion for Rehearing (No. 08-07-00324).....App. M

August 7, 2009 Supreme Court of Texas Order Denying Motion for Rehearing (No. 08-07-00093).....App. N

Boyer v. Jones.....App. O

TABLE OF AUTHORITIES

CASES

Appleton v. Appleton,
76 S.W.3d 78 (Tex. App. –
Houston (14th Dist.) 2002).....22

Baker v. Welch,
735 S.W.2d 548 (Tex. App. –
Houston [1st Dist.] 1987, writ dism'd)...12, 30

Casas v. Wornick Co.,
818 S.W.2d 466 (Tex. App. –
Corpus Christi 1991, writ ref'd).....12

Cire v. Cummings,
134 S.W.3d 835 (Tex. 2004).....23

Deloach v. Delchamps, Inc.,
897 F.2d 815 (5th Cir. 1990).....ii, 6

Ford Motor Company v. Castillo,
279 S.W. 3d 656 (Tex 2009).....32, 34, 35, 36

Gonzalez v. Gutierrez,
694 S.W.2d 384 (Tex. App.–
San Antonio 1985, no writ.).....30

GTE Communications Systems Corp. v. Tanner,
856 S.W.2d 725 (Tex. 1993).....23

Hood v. Edward D. Jones & Co., L.P.,

2009 Tex.App. LEXIS 544,
(Tex.App. - El Paso, Jan. 29, 2009).....1

Hood v. Edward D. Jones & Co., L.P.,
2009 WL 202466
(Tex.App. -El Paso).....1

In re Small,
2009 WL 1620436 (Tex.App.–
El Paso).....32, 34

Joint Anti-Fascist Committee v. McGrath,
341 U.S. 123 (1951)
(Frankfurter, J., concurring).....41

Marathon Oil Co. v. Moye,
893 S.W.2d 585 (Tex.App.–
Dallas 1994, orig. proceeding).....32

Matthews v. Eldridge,
424 U.S. 319 (1976).....41

McDonnell Douglas Corp. v. Green,
411 U.S. 804 (1973).....ii

Mullins v. Raytheon Co.,
164 F.3rd 696 (1st Cir. 1999).....6

Peeples v. Hon. Fourth Supreme Judicial Dist.,
701 S.W.2d 635 (Tex. 1985)
(orig. proceeding).....32

Quantum Chemical Corporation v. Toennies,

47 S.W.3d 482 (Tex. 2001).....ii

Smith v. City of Jackson,

544 U.S. 228 (2005).....ii, 7

TransAmerican Nat. Gas Corp. v. Powell,

811 S.W.2d 913 (Tex. 1991).....22-23

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

U.S. Const. amend. XIV, § 1.....2

TEX. R. CIV. P. 192.3.....9, 10, 25, 27

TEX. R. CIV. 192.4.....9

TEX. R. CIV. 192.4 (b).....26

Tex.R.Civ.P. 193.3(a).....32

TEX.R.CIV.P. 193.3(c).....26

OTHER AUTHORITIES

A Decade of Watching and Waiting: The Texas Supreme Court in Review 2005-2006,

Texas Watch Foundation, March 2007.....38

Champagne, *The Selection and Retention of Judges in Texas,*

40 SWLJ 53, 84 (1986) 38

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Outlook at 2 38

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Interested Parties: Who Bankrolled Texas' High-Court Justices in 2008?, Texans for Public Justice, October 2009.....38

Leadership (2006), http://www.tortreform.com/leaders.....40

Line of Succession of Supreme Court of Texas Justices from 1945: The Modern Court (2009), http://www.supreme.courts.state.tx.us/court/sc-justices-1945-present-111406.pdf.....38

No End in Sight: Texas Supreme Court Maintains its Longstanding Tradition of Pro Defendant Bias 2006-2007, Texas Watch Foundation Annual Report,

August 27, 2008.....38

PAC for Texas Doctors Gives to Court Hopefuls,
Beaumont Enterprise, Oct. 14, 1988.....38-39

Quality of Justice: Texan Case Spotlights Question on Integrity of the Courts in Texas.
Wall Street Journal, November 4, 1987, at 1.....38

Shifting Sands for Consumers: Increased Control by Activists, Defection of Moderates Leaves Consumers Looking for Relief,
Texas Watch Foundation 2002-2003.....39

Shining a Light: The Texas Supreme Court's Annual Report 2007-2008,
Texas Watch Foundation, 2009.....39

Texans for Public Justice, *Courtroom Contributions Stain Supreme Court Campaigns*, (2008), http://info.tpj.org/reports/courtroom contributions/courtroomcontributions.pdf 39-40

Texans for Public Justice Funded By Trial Lawyers,
TLR Press Release, November 2, 2006.....40

Texas Watch Foundation, *Justice for Sale in Texas?,*
KHOU (Houston, Texas), May 13, 2008.....39

The Texas Supreme Court by the Numbers:

A Statistical Analysis of the Texas Supreme Court 2005-2006,
Texas Watch Foundation 2007.....39

OPINIONS BELOW

The opinions of the Eighth District Court of Appeals appear at Appendix G. and H. and are reported at *Hood v. Edward D. Jones & Co., L.P.*, 2009 Tex.App. LEXIS 544, (Tex.App. - El Paso, Jan. 29, 2009) and *Hood v. Edward D. Jones & Co., L.P.*, 2009 WL 202466 (Tex.App. -El Paso).

JURISDICTION

Pursuant to Rule 12.4, this writ seeks review of the judgments of the Eighth Court of Appeals of Texas. The Supreme Court of Texas denied the petitions for review on June 12, 2009. Copies of these denials appear at Appendix K. and L. Timely petitions for rehearing were thereafter denied on August 7, 2009, and copies of these orders denying rehearing appear at Appendix M. and N. The jurisdiction of this court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment of the United States Constitution provides in relevant part

> No state shall . . . deprive any person of life, liberty, or property without due process of law.

U.S. Const. amend. XIV, § 1.

STATEMENT

A. Discharge of Hood and Replacement by Scott

On April 10, 1990 Hood began employment at Edward D. Jones & Co., L.P. On May 1, 1998 62-year-old Hood, a BOA (Branch Office Administrator), was discharged from employment with the Defendants, Jones and Rogers and replaced with 31-year-old Lyn Scott who testified at the trial:

> Q: And, after Ms. Hood left, May 1st, of '98, how long were you the only B.O.A. in the office if you can remember?
> A: God, that was nine years ago. I would say probably four or five months.
>
> Q: Did you assume any of the duties of Syble Hood after May 1st, of '98?
> A: Well, I was the only B.O.A. left in the office, so Robby had to pitch in and we both continued to run the office.

6 RR 555-556.

B. Request for Statistical Data of Discrimination and Inclusion Department

On April 5, 1999 Jones provided a hard copy list of discharged employees over the age of 50. 1 CR 116. Hood requested a list of all discharged BOAs (the same category as Hood) from 1990 to date, but on May 19, 1999, Jones informed Hood that BOA records were "not available." 1CR: 129. On May 24, 1999 Hood requested electronic or magnetic data from 1990 to present for:

> a) the ages for all employees for each year;
> b) the sexes for all employees for each year;
> c) the ages/sexes for each job classification per year;
> d) any other data regarding company employees including, age, sex, classification, hires, fires, retirements and terminations for any other reason:
>
> > 1) any analysis, assessment and/or survey made by the company regarding any of the above categories;
>
> e) company personnel/Human Resources practice and procedure manuals or any other documents which set forth the company's procedures regarding personnel including, but not limited to, hiring, firing, assessments

> of abilities, annual review and prevention of age discrimination.
> 1 CR 122.

On July 19, 1999 Jones objected to Hood's May 24, 1999 request for a list of discharged employees from 1990 to the present stating:

> Objection on the basis that the request is unduly burdensome and harassing. Defendants provided this information to Plaintiff on hard copy. Edward D. Jones & Co. has one large mainframe which includes all of its proprietary information, nationwide. Edward D. Jones & Co. does not have the capability to make a disk from any of its software system information. Subject to the above objection, none.
>
> None of the categories listed in Request for Production No. 1 above are available in electronic or magnetic data form.
> 1 CR 128.

Despite this objection, on November 12, 1999 Jones emailed Hood a list of all employees discharged over the age of 50 from 1990 to date (response to Interrogatory No. 10). 1 CR 119-121.

On June 8, 2000 Jones objected to Hood's May 19, 2000 request for production requesting a list of all discharged employees from 1990 to the

present on the basis that the request was overbroad, burdensome and harassing and requested information not relevant to the case. 1 CR 132.

On July 7, 2000 Hood filed a Motion to Compel Discovery regarding Jones' failure to provide a list of employees discharged by Jones since 1990 to the present:

> Jones has provided by e-mail to Hood a list of persons over the age of 50, but Hood needs Jones' information on discharged employees under the age of 50 to determine a statistical profile. Hood had offered to receive the information only on BOA's (Hood's job) but Jones said this information was unavailable. Then, Hood sought the list of all terminated employees since 1990 to which Jones has objected. Since Jones' home office was involved in the termination of Hood, statistical information is needed to show Jones' alleged reason for termination was pretextual and to rebut Jones' case. Moreover, the information Hood seeks must be readily available to Jones since Jones was able to provide a computer generated list by e-mail of all discharged employees over the age of 50. (See Exhibit "B3").
>
> The purpose of the above information is to determine whether Jones discharges or terminates employees over 40 at a greater rate than persons under 40. This evidence is necessary in a discrimination suit to rebut

> Jones' claim that Hood was discharged for non-discriminatory reasons. See, *Deloach v. Delchamps, Inc.*, 897 F2nd 815, 820 (5th Cir. 1990).
> 1 CR 85.

On September 12, 2000 Jones and Rogers filed a Response to Plaintiff's Motion to Compel Discovery stating:

> The information Plaintiff intends to obtain as a result of the documents requested would fail to meet the requirements discussed in the proceeding paragraph. At most, the statistical information requested by Plaintiff would show a "disparate impact," which would not meet the burden required for Plaintiff to prove intentional discrimination. *Mullins v. Raytheon Co.*, 164 F.3rd 696,700-701 (1st Cir. 1999). More importantly, Plaintiff's claim cannot be grounded solely on a theory of "disparate impact." *Id.* Therefore, even if Defendants could produce the requested documentation, the information provided to Plaintiff would have no legal impact on the presentation of their case. Specifically, the information would not create a genuine issue of material fact as to Defendants' pending Motion for Summary Judgment (the only purpose of the request would be to overwhelm the Court with documentation in attempts to distract the Court from the issues relevant to Defendants' pending Motion for Summary Judgment).
> 1 CR 136-137.

On November 6, 2000 Jones' attorney Michael McCauley wrote a letter to Judge Rex in response to Plaintiff's Motion to Compel Discovery stating that the cost of providing the records of discharged employees would be burdensome and too expensive as it would produce "over 9,000 pages of documents" and "would cost over $12,365.00". 1 CR 139.

On June 16, 2005 Hood filed an Amended Motion to Compel Discovery quoting *Smith v. City of Jackson,* 544 U.S. 228 (2005), which held that disparate impact theories are applicable in claims for age discrimination. Therefore discovery of statistical information of Jones termination of employees older than 50 years of age was required. 1 CR 226. On October 24, 2006 the Trial Court, on its own insistence, only requested Jones to provide Hood with the list of employees terminated between the ages of 40 and 50. 1 RR 11.

C. Inclusion Department and Pertinence of Statistical Information

Mary Kranzberg, an employee of Jones in

their Human Resources Department, testified in her deposition on February 10, 2006 that Jones had an "inclusion" department which could analyze its own data to determine whether or not employees in protected classes were being discharged at a greater rate than other employees:

> Q. Well, I mean have you all ever done any kind of analysis just to try to make sure that you all aren't, that your numbers aren't off? In other words, to see if there may be some problem out there that's occurring that the numbers suggest but that maybe you're not aware of?
> MR. MCCAULEY: Objection. Form. If you know.
> A. No, I don't know.
> Q. I mean do you all ever do anything like that, try to look at the numbers
> MR. MCCAULEY: Objection. Form.
> Q: And see, for example, that you're not hiring enough black people or that you're firing too many black people or you're not hiring enough people over 40 or you're firing too many people over 40, have you all ever done, ever gone through those analyses?
> MR. MCCAULEY: Objection. Form.
> A. We have an inclusion department that looks at those numbers. They're responsible for insuring that the firm is, has initiatives that work in a way that insures we have an inclusive workforce.
> 3 CR 516-517.

On October 11, 2006 Hood filed a Motion to Compel Production of Documents requesting the "inclusion" department's documents to be provided to her to which Jones objected as follows:

> REQUEST FOR PRODUCTION NO. 11
> Any document reflecting if Edward D. Jones & Co., L.P. made an analysis of its workforce in whole or part over the age of forty from 1990 to the present including any analysis by the "inclusion" department referred to by Mary Kranzberg and Beth Cook in their depositions.
>
> ANSWER: Defendant objects that this request for production is overly broad, unduly harassing and oppressive, thereby causing an unnecessary expense to disclose such information and exceeding the scope of discovery pursuant to TEX. R. CIV. 192.4. Defendant further objects that this request inquiries into a matter which is not relevant to the subject matter in the pending action and further is not reasonably calculated to lead to the discovery of admissible evidence. TEX. R. CIV. P. 192.3. Defendant further objects that this request inquires into a overly broad time period which renders the information sought irrelevant to the subject matter in the pending action, and is further not reasonably calculated to lead to the discovery of admissible evidence. Lastly, Defendant objects that this request seeks discovery of matters which are beyond the scope of discovery and therefore, constitutes

> an inappropriate discovery request under the Texas Rules of Civil Procedure, including Rule 192.3.
> 5 CR 843.

Kranzberg's own trial testimony revealed the pertinence of the statistical information to the case when she stated that she did not determine who replaced Hood and admitted the fact that a 31-year-old replacing a 62-year-old could be a cause for concern of age discrimination. Neither she nor Louis Branz (an in-house attorney for Jones who filed a response with the EEOC denying age discrimination) ruled out age discrimination:

> Q: And I asked you in your deposition, I asked: Do you know who replaced Syble Hood? And what was your answer?
> A: I don't recall what my answer was.
> Q: But did you say, I don't know who, it wasn't my area of responsibility to find out who replaced her, so I didn't. Was that your answer?
> A: Correct. Correct. Yes.
> Q: And then I said: Well, then who took her job? And your answer then: I don't know. Correct.
> A: I believe that's correct.
> Q: Did you, you're saying you took Lyn Scott's age and the fact she had replaced Syble Hood into consideration?
> A: No, I didn't. No, I did not. No sir.

Q: And there's nothing in your notes or the file that show that a -- you ruled out age as the motivating factor in the case, is that correct?
A: No, that's not.
Q: Is there anything that you could show, you could show the jury that, could look at your notes and see how you ruled out age discrimination? And your answer was No.
A: That's correct.
Q: Ok. And you agree that a 62-year-old was replaced by a 31-year-old and that could be cause for concern, whether that could be age discrimination, is that correct?
A: That's correct.
Q: Did you, you're saying you took Lyn Scott's age and the fact she had replaced Syble Hood into consideration?
A: No, I didn't. No, I did not. No, sir.
Q: And there's nothing in your notes or the file that show that a -- you ruled out age as the motivating factor in this case, is that correct?
A: No, that's not.
Q: Now you're not familiar whether or not Mr. Louis Brantz did anything to try to rule out age discrimination as a factor in this case, did you?
A: No.
5 RR 38-44.

D. Rogers' Motion for Summary Judgment

On January 5, 2006 Rogers filed a Motion for Summary Judgment, 2 CR 281, which included the

affidavits of Hood's supervisor, Robby Rogers, 2 CR 300, and Steve Rarick, 2 CR 302, an employee of Jones in their Human Resources Department. Rogers' Motion for Summary Judgment stated pertinently:

> 2. Application of law to facts
> To begin with, Plaintiff cannot prove the first element of her cause of action, that a written or oral contract existed. To the contrary, Plaintiff's employment was at will (See Exhibit "A", Rogers Aff., 1:19; See Exhibit "B", Rarick Aff., 4:2-3). Plaintiff had no contract or contractual relationship with Edward Jones. (See Exhibit "A", Roger Aff., 1:19-20; Exhibit "B", Rarick Aff., 4:3) If there is no contract, there is nothing with which to interfere. In case at bar, since Plaintiff was an employee "at will" with Edward Jones, she had no contract of employment (See Exhibit "A", Rogers Aff., 1:19-20 See Exhibit "B", Rarick Aff., 4:2-3).
>
> It is well settled that, absent a specific contractual provision to the contrary, an employer has the absolute right to terminate an employee with or without cause when employment is "at-will". *Casas v. Wornick Co.*, 818 S.W.2d 466, 469 (Tex. App. – Corpus Christi 1991, writ ref'd). "A party cannot tortiously interfere with himself. Liability must be founded upon the acts of an interfering third party." *Baker v. Welch*, 735 S.W.2d 548, 549 (Tex. App. – Houston [1st

> Dist.] 1987, writ dism'd). In other words, for liability to attach to Rogers, he would have to be acting in his individual capacity, not that as a corporate representative . *Id* . A party to a business relationship cannot tortiously interfere with himself. *Baker*, 735 S.W.2d at 549.
>
> . . .
>
> G. Summary
> Rogers had sole management control over employees at the Andrews branch. (See Exhibit "A", Rogers Aff., 1:12-14; See Exhibit "B", Rarick Aff., 3:17-22) As such, Rogers was Edward Jones' employee acting as an agent. (See Exhibit "B," Rarick Aff., 3:16-17).

This is in contrast to the 2003 decision of the U.S. District Court of Nebraska in the case of *Boyer vs. Edward Jones*, 2003 WL 25693573 (Neb.) which case was presented to the Court of Appeals post-argument. Jones did not disclose the case to Hood in any supplements to discovery responses requesting other discrimination cases. 1 CR 88, 91. There, a 32-year-old replaced 55-year-old Boyer who claimed tortious interference with her contract by the IR (investment representative). Jones did not attempt to suggest that the IR (the same position held by Mr. Rogers) had any power to terminate

employees. Jones' Mr. Rarick was also a witness there but no alter ego argument was made.

The affidavits of Rogers and Steve Rarick which were exhibits to Rogers' Motion for Summary Judgment provided pertinently:

Rogers stated in his affidavit as follows:

> As the Investment Representative, I was responsible for the management of the Andrews branch office and I was the highest ranking employee in that office. My responsibilities included human resource decision making, including hiring and terminating of personnel and evaluations of employee work performance for employees under my supervision through ratification of Human Resources of Edward Jones.
>
> On May 1, 1998, due to her failure to improve her job performance, as part of my job responsibilities for Edward Jones, I terminated Ms. Hood for insubordination, poor work performance, failure to perform order tasks and absenteeism, which was ratified by Mare [*sic*] Kranzberg in Human Resources at Edward Jones.
> 2 CR 300.

Steve Rarick stated in his affidavit pertinently:

> Rogers acted for Edward Jones as its agent in his capacity of Investment Representative. As the Investment Representative, Rogers was

> responsible for managing the branch office and was the highest ranking employee in that office. Rogers responsibilities included human resource decision-making, which included hiring and firing of personnel and evaluations of employee work performance for employees under his supervision. Rogers was responsible for making all personnel decisions related to employees at the Andrews Branch office of Edward Jones.
> 2 CR 302.

On February 16, 2006 Kranzberg, in her deposition, stated that Rogers could not fire Hood without the permission of Jones:

> We do not allow them to terminate individuals. We must validate what the situation is. I validated it was her performance.
> 3 CR 507.

Further, in her office notes she described how Rogers could not do anything illegal or unethical:

> 05/06/97 Rob and I discussed the progressive discipline process and he believes that the performance review services or verbal warning with an expected improvement time frame of six months. I encouraged him to document, print vi, boa, (sic). Profile and vi, boa (sic) checklists. I explained that HR would help him with the process and write a written warning.

> 04/02/98 I will write a final written warning with the information Robby sends me provided it is warranted. I will determine the nature and content of the warning and get in touch with Robby.
>
> 04/20/98 Today Robby and I served a final written warning to Syble. I place (sic) a conference call to Syble and Robby to discuss the final written warning. I explained that we would allow each and every IR to practice their own management style, as long as it is not illegal and unethical.
> 3 CR 459, 466-467.

On February 22, 2006 Hood filed a response to Rogers Motion for Summary Judgment, 2 CR 380, which included an affidavit by Hood:

> After six years of favorable annual performance evaluations, I received my first poor performance review in April, 1997. The review stated I 'needed improvement' in the areas of 'customer service' and 'interpersonal skills', 'meets expectations' in 'office administration and marketing support' and 'exceeds expectations' in 'personal development'. Also, in April, 1997, for the first time in my career, there was also a home office evaluation of our office. I turned 62 on June 7, 1997. After the review, I was not informed by that person that my performance was inadequate nor did I receive from her or the home office any written evaluations or criticisms.

From this 1997 evaluation to my termination in May, 1998, my relationship with Mr. Rogers at work was a nightmare. Robby was not easy to approach on any matter on which I needed his expertise. He was discourteous, rude, overly critical and arrogant. One time he acted this way when a customer was present which was uncomfortable to both me and the customer. He would come into my office and just stare at me. In June, 1997, I began having outbreaks of rashes and started losing weight. My review on April 20, 1998, was perfunctory and was followed by my termination on May 1, 1998. The criticisms of my work were unsubstantiated and a pretext to either drive me off or terminate me. Lyn Scott, the other BOA, received preferences I did not receive including being allowed to study while at work, taking off to pick her children up from school, taking off for hair appointments and spring break.

The last two employees hired by Mr. Rogers had very little background work or experience for the positions they filled. Lyn Scott told me she worked part-time for a veterinarian in high school until she dropped out. She did get her GED and worked for a hospital in Midland as a file clerk. Approximately two weeks prior to my termination, a student, Casey Silva, was hired on a part-time basis. This student stayed until early September, 1998 at which time another young lady by the name of Tammie Ashabranner, who was in her early

> 30's, was employed and remains so at the present time. Tammie and Lyn were friends to the extent they alternated care of their children between their respective jobs. At the time she was hired, I believe Tammie was a cook at Permian General Hospital. Thus, there were two full-time employees at Edward D. Jones on the date of my termination and there are two full-time employees today. Neither person is over 40 years of age.
> 2 CR 450-451.

On February 24, 2006 Hood filed an Objection and Motion to Strike Portions of Affidavits of Robby Rogers and Steve Rarick and a Motion for Continuance and/or Motion to Allow Supplemental Response to Motion for Summary Judgment, 3 CR 458, and a Motion for Continuance and/or Motion to Allow Supplemental Response to Motion for Summary Judgment 3 CR 468.

On February 28, 2006, the day of the hearing on Rogers' Motion for Summary Judgment, 3 RR 2, Hood filed a Supplement to Motion for Continuance and/or Motion to Allow Supplemental Response to Motion for Summary Judgment containing the deposition of Mary Kranzberg and a Brief in Support of Response to Pleas to the Jurisdiction and

Motion for Summary Judgment, arguing that the affidavit of Rogers stated that Hood was an "at will" employee, but the testimony from Mary Kranzberg in her deposition stated that Rogers had to have the permission of Jones to fire Hood. 3 CR 489, 525.

On October 24, 2006 Rogers testified pertinently at trial:

> Page 14, Lines 4-25:
> Q: (BY MR. WHITESIDE): Now to be able terminate an employee with Edward Jones, again, I guess we just touched upon this, but you had to have permission from the home Office to terminate somebody, correct?
> A. And documentation.
> Q. And documentation. In other words, we, have you ever heard of the term "at will" contracts? I mean if you have, just nod.
> A. Yes .
> Q. Okay. And are you – could you terminate anybody for any reason at Edward Jones?
> A. Could you repeat the question?
> Q. Could you terminate any employee at Edward Jones for any reason?
> A. For any reason that was documented properly and was within the confines of the law.
> Q. No. I'm saying for any reason. Could you say, I don't like that person, could you terminate an employee because you didn't like them?
> A. Not without proper documentation.
> Q. And this proper documentation is what? In

> other words, that is your reporting to Edward Jones about deficiencies or problems or something like that with the employee?
>
> Page 15, Lines 1-2:
> A. There's a protocol and a process in place through the Human Resources.
> Partial RR 14-15.

E. Hood's Motion for Sanctions

On October 26, 2006 the Jury answered the Court's Charge to the Jury in favor of the Defendant. 5 CR 984. On October 27, 2006 Hood filed her Motion for Relief Under TRCP 13 and 166a(h) stating pertinently:

> As shown by the testimony at trial of Rogers and Mary Kranzberg, these affidavits were false and a violation of TRCP 13 and TRCP 166a(h) and the allegations in said pleadings were a violation of TRCP 13 entitling Hood to appropriate sanctions, attorney fees and expenses. 6 CR 992.

On November 27, 2006 Jones and Rogers filed their Response to Plaintiff's Motion for Relief Under TRCP 13 and166a(h). 6 CR 1047. On November 30, 2006 Hood served a Subpoena Duces Tecum on Robby R. Rogers, R. Michael McCauley, Timothy T. Pridmore, and McWhorter, Cobb & Johnson, the attorneys and law firm representing Jones and

Rogers, requesting the following documents and identities:

> Matters on Which Examination Requested:
> To testify and/or produce the DOCUMENTS requested including who participated in any way in drafting and/or making revisions to Defendant, Robby Rogers' Motion for Lack of Jurisdiction and Motion for Summary Judgment and Brief in Support Thereof dated January 4, 2006 and the affidavits of Robby R. Rogers and Steve Rarick, attached as Exhibit A and B thereto including, but not limited to, faxing, mailing or emailing of the drafts of the same or the final drafts of the motion and affidavits between McWhorter, Cobb & Johnson, L.L.P., Edward D. Jones & Co., L.P., Kimber Monroe, and/or the Edward D. Jones' legal department, Steve Rarick and Robby R. Rogers or any other person or entity, their representatives, agents, servants and employees.
>
> Documents to Produce:
> Any DOCUMENTS in your "POSSESSION, CUSTODY, OR CONTROL" which reflect the IDENTITY of all persons or entities who participated in any way in drafting and/or making revisions to Defendant, Robby Rogers' Motion for Lack of Jurisdiction and Motion for Summary Judgment and Brief in Support Thereof dated January 4, 2006 and the affidavits of Robby R. Rogers and Steve Rarick, attached as Exhibit A and B thereto including, but not limited to, faxing, mailing or emailing of the drafts of the same or the

> final drafts of the motion and affidavits between McWhorter, Cobb & Johnson, L.L.P., Edward D. Jones & Co., L.P., Kimber Monroe, and/or the Edward D. Jones' legal department, Steve Rarick and Robby R. Rogers or any other person or entity, their representatives, agents, servants and employees.
> 6 CR 1076.

On December 1, 2006 Hood filed a First Supplement to Motion for Relief Under TRCP 13 and TRCP 166a(h) stating pertinently:

> ... These affidavits, and the pleadings which relied on them, were not the result of mere bad judgment and negligence, but were consciously drafted and executed by EDWARD JONES and ROGERS to secure action by this Court to dismiss claims against ROGERS knowing full well that the statements were false. See *Appleton v. Appleton*, 76 S.W.3d 78, 86-87 (Tex. App. – Houston (14th Dist.) 2002). ROGERS did not have "sole management control over the employees at the Andrews branch." ...This Court should strike EDWARD JONES' and ROGERS' answers, disregard the jury verdict and set the case for trial and determination of Plaintiff's actual and punitive damages, attorney fees and costs. These sanctions should be imposed on the parties for their knowing complicity in the execution of the pleadings and drafting of the affidavits. *TransAmerican Nat. Gas Corp. v. Powell*, 811

> S.W.2d 913, 917 (Tex. 1991). Here death penalty sanctions should be imposed since lesser sanctions are insufficient to deter this type of egregious conduct which conduct justifies the presumption that EDWARD JONES and ROGERS defenses lack merit. See *Cire v. Cummings*, 134 S.W.3d 835,842 (Tex. 2004); see also *GTE Communications Systems Corp. v. Tanner*, 856 S.W.2d 725, 729-730 (Tex. 1993).
> 6 CR 1051.

Hood filed Plaintiff's Fifth Request for Production on January 8, 2007 requesting the following:

> REQUEST FOR PRODUCTION NO. 1
> Any documents in your "POSSESSION, CUSTODY, OR CONTROL" which reflect the IDENTITY of all persons or entities who participated in any way in drafting and/or making revisions to and final approval of Defendant, Robby Rogers' Motion for Lack of Jurisdiction and Motion for Summary Judgment and Brief in Support Thereof dated January 4, 2006 and the affidavits of Robby R. Rogers and Steve Rarick, attached as Exhibit A and B thereto including, but not limited to, faxing, mailing or emailing of the drafts of the same or the final drafts of the motion and affidavits and any discussions of and decisions made by and between McWhorter, Cobb & Johnson, L.L.P., Edward D. Jones & Co., L.P., Kimber Monroe, and/or the Edward D. Jones' legal department, Steve

Rarick and Robby R. Rogers or any other person or entity, their representatives, agents, servants and employees.

REQUEST FOR PRODUCTION NO. 2
Any documents in your "POSSESSION, CUSTODY, OR CONTROL" which reflect all discussions of and all decisions made regarding all drafts and/or revisions and final approval for Defendant, Robby Rogers' Motion for Lack of Jurisdiction and Motion for Summary Judgment and Brief in Support Thereof dated January 4, 2006 and the affidavits of Robby R. Rogers and Steve Rarick, attached as Exhibit A and B thereto including, but not limited to, faxes, mailed documents, letters of transmittal, memos, notes, emails by and between McWhorter, Cobb & Johnson, L.L.P., Edward D. Jones & Co., L.P., Kimber Monroe, and/or the Edward D. Jones' legal department, Steve Rarick and Robby R. Rogers or any other person or entity, their representatives, agents, servants and employees.
6 CR 1079.

On January 16, 2007 Jones and Rogers responded to Hood's Fifth Request for Production as follows:

RESPONSE: Defendant objects to this request for reason that the deadline to produce and serve discovery has passed in this case. Defendant further objects to this request for the reason that it seeks discovery

> of matters protected from disclosure by the attorney-client privilege pursuant to Texas Rule of Civil Procedure 192.5 and the Texas Rule of Evidence 503. Defendant also objects to this request for the reason that it seeks discovery of matters which are beyond the scope of discovery and, therefore constitutes an inappropriate discovery request under the Texas Rules of Civil Procedure, including Rule 192.3.
> 6 CR 1083.

On January 22, 2007 Hood filed a Motion to Compel Production of Documents and Motion to Submit Documents *In Camera* regarding the documents requested in Hood's Fifth Request for Production. 6 CR 1071.

On February 13, 2007 Hood served a Subpoena Duces Tecum on Robby R. Rogers, R. Michael McCauley, attorney for Jones and Rogers, Timothy T. Pridmore, attorney for Jones and Rogers & McWhorter, Cobb & Johnson, the law firm representing Jones and Rogers requesting the documents that had been requested in the January 8, 2007 Request for Production.

Also on February 13, 2007 Jones and Rogers filed a Motion to Quash Plaintiff's Subpoena Duces Tecum stating pertinently:

OBJECTION: Movants object to this request for the reason that the deadline to produce and serve discovery have [*sic*] long since passed in this case. Movants further object that the request is vague, overly broad and unduly burdensome. Movants further object to the extent that the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties [*sic*] resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving disputed issues of material fact. TEX.R.CIV.P. 192.4(b). Movants further object to the extent that the instant request is made solely for the purposes of harassment. Movants further object to the extent that this request constitutes an impermissible "fishing expedition."

PRIVILEGE: Movants are of the opinion that as the matters upon which discovery is sought concern communications between Defendants and their lawyers regarding the subject matter of the litigation, no withholding statement is required pursuant to the TEX.R.CIV.P. 193.3(c). Nevertheless, in an abundance of caution, Movants object to this request for the reason that it seeks discovery of matters protected from disclosure by the core work product, other work product, and attorney-client privileges pursuant to Texas Rule of Civil Procedure 192.5 and Texas Rule of Evidence 503. Accordingly, responsive information and/or materials have been

withheld on that basis.
6 CR 1107.

On February 14, 2007 Jones and Rogers filed a Response in Opposition to Plaintiff's Motion to Compel and Motion to Submit Documents *In Camera* and Defendants' Motion for Protection Order and Request for Expenses Pursuant to Texas Rule of Civil Procedure 215.1(d), 6 CR 1116, in response to a request for documents in Plaintiff's Fifth Request for Production stating pertinently:

> RESPONSE: Defendant objects to this request for reason that the deadline to produce and serve discovery has passed in this case. Defendant further objects to this request for the reason that it seeks discovery of matters protected from disclosure by the attorney-client privilege pursuant to Texas Rule of Civil Procedure 192.5 and the Texas Rule of Evidence 503. Defendant also objects to this request for the reason that it seeks discovery of matters which are beyond the scope of discovery and, therefore constitutes an inappropriate discovery request under the Texas Rules of Civil Procedure, including Rule 192.3.
> 6 CR 1079.

On February 21, 2007 Jones and Rogers filed their Response to Plaintiff's Motion for a New Trial stating pertinently:

> Even assuming, solely for the sake of argument, Plaintiff is correct and the testimony is "inconsistent," Plaintiff has failed to explain what *legal* ramifications the residual exercise of oversight through the ratification of Rogers employment decisions has for this case. Certainly, Defendants know of no such implications, considering that *a jury of Ms. Hood's peers unanimously found that age was not a motivating factor in her termination.*
> 6 CR 1139.

On February 22, 2007 the Trial Court signed an Order Denying Plaintiff's Motion to Compel Production of Documents and Motion to Submit Documents *In Camera,* 6 CR 1145, and an Order Granting Edward D. Jones & Co., L.P., Robby R. Rogers, Timothy T. Pridmore, R. Michael McCauley, Jr., and McWhorter, Cobb & Johnson, L.L.P.'s Motion to Quash Plaintiff's Subpoena Duces Tecum.

F. Hood's Mandamus to the Court of Appeals and Texas Supreme Court

On March 10, 2007 Hood sought mandamus from the Eighth Court of Appeals for the Trial Court's refusal to examine the documents *in camera,* 6 CR 1150-1151. Relief was denied on March 22,

2007. App. C.

On March 29, 2007 Hood filed a substantially identical Petition for Writ of Mandamus with the Supreme Court of Texas. On April 4, 2007 Hood filed a Notice of Appeal. 6 CR 1152. On June 1, 2007 The Supreme Court of Texas denied Hood's Petition for Writ of Mandamus. App. D. On June 21, 2007 Hood filed a Motion for Rehearing with the Texas Supreme Court on the Petition for Writ of Mandamus. On July 27, 2007 the Supreme Court denied Hood's Motion for Rehearing. App. E.

G. Trial Court Order Denying Hood's Motion for Sanctions and Granting Jones' Motion for Sanctions and Hood's Objection

On October 23, 2007, after a hearing, the Trial Court signed an order denying Hood's Motion for Sanctions and awarded attorney fees of $3,000 and expenses of $258.31 to Jones. 2nd Supp. CR 1. App. F.

H. Court of Appeals Decisions

The Court of Appeals in two opinions issued simultaneously affirmed. In 08-07-00324 the Court

noted that since there was no evidence to support Hood's motion for sanctions there was no abuse of discretion. The court likewise affirmed the award of attorney fees and expenses to Jones against Whiteside, relying only on TRCP 215.1(d). In 08-07-0093, the Court affirmed the trial court's granting of summary judgment to Rogers regarding the tortious interference claim on the basis that since he acted "within the scope of employment as a 'corporate representative' he cannot tortiously interfere with a contract between his employer and an individual or entity." App. H. This is the "alter ego" theory of *Baker v. Welch* 735 S.W.2d 548, 549 (Tex. App.-Houston (1st Dist) 1987, writ. dism'd.) cited by Jones in its summary judgment brief and *Gonzalez v. Gutierrez,* 694 SW2d 384, 388-89 (Tex. App.-San Antonio 1985, no writ.) cited by the Court of Appeals. The court then turned to the issues of denial of statistical data and Hood's request for sanctions. The Court criticized Hood's "failure to detail the statistical analysis of the data she had already obtained" (terminations of employees over 50). App. H. The Court found no abuse of discretion and refused to engage in "wild speculation

as to what the documents produced actually showed or that additional discovery was necessary." App. H.

The Court affirmed the denial of Hood's request for an *in camera* review of Jones' documents which were allegedly protected by attorney-client privileges and not produced. The court found that there was no more than a "minor discrepancy" between the affidavits and trial testimony. App. H. Moreover, the Court held that the Rule "is not served by allowing Hood to peruse the attorneys' files in a fishing expedition launched the day the jury returned a vote against her." App. H. The Motion for Rehearing was denied. App. J.

REASONS FOR GRANTING THE PETITION

I. Recent Decisions of the El Paso Court of Appeals and the Texas Supreme Court highlight the dual system of justice that exists in Texas.

The Texas court system's (trial court, court of appeals and supreme court) refusal to grant Hood's well-founded request for age discrimination statistical data and Jones' own "inclusion

department" analysis of its workforce, and, most significantly, *in camera* review of Jones' withheld documents, is emblematic of Texas' ultraconservative shift away from individual rights. This shift is evident when contrasted with the Texas Supreme Court's recent decision in April in *Ford Motor Company v. Castillo,* 279 S.W. 3d 656 (Tex 2009) and the El Paso Court of Appeals June decision *In re Small,* 2009 WL 1620436 (Tex.App.–El Paso). In *Small,* the Court of Appeals carefully outlined the crime-fraud exception for the attorney-client privilege but found the Plaintiff failed to establish a *prima facie* case of contemplated fraud since no under the following rules:

> To establish a privilege, a party must plead the particular privilege, produce evidence to support the privilege through affidavits or testimony, and produce the documents themselves if the trial court determines an *in camera* review is necessary. *See* Tex.R.Civ.P. 193.3(a); *Peeples v. Hon. Fourth Supreme Judicial Dist.,* 701 S.W.2d 635, 637 (Tex. 1985) (orig. proceeding). Once the party resisting discovery establishes a *prima facie* case that the documents are privileged, the burden shifts to the discovering party to refute the privilege claim. *See Marathon Oil Co. v. Moye,* 893 S.W.2d 585, 591 (Tex.App.-Dallas 1994, orig. proceeding).

. . .

Texas Rule of Evidence 503(d)(1) provides that material otherwise protected by the attorney-client privilege is discoverable if the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud. *See* Tex.R.Evid. 503(d)(1); *In re Seigel,* 198 S.W.3d at 28. The crime fraud exception only applies if: (1) the party asserting the exception establishes a *prima facie* case of contemplated fraud; and (2) there is a relationship between the document for which the privilege is challenged and the *prima facie* proof offered. *In re Seigel,* 198 S.W.3d at 28.

The *prima facie* requirement is met when the proponent offers evidence establishing the elements of fraud and that the fraud was ongoing, or about to be committed at the time the document was prepared. *Id.* Mere allegations of fraud are not sufficient. *Id.* Similarly, the fact that the plaintiff's cause of action involves fraudulent conduct is also insufficient. *Id.* The fraud alleged to have occurred must have happened at or during the time the document was prepared, and the document must have been created as part of perpetrating the fraud. *Id.* at 28-9. The trial court must make findings both that the *prima facie* case has been established and that a nexus exists between the document at

issue and the alleged fraud. *Id.* at 29.

While demonstrating in *In re Small* a keen awareness of the exception and the in camera procedures, the same panel of the Court of Appeals in Hood slightly over four months earlier made no mention of the crime-fraud exception, much less that Hood was precluded from making a *prima facie* case showing the "relationship between the document . . . and the *prima facie* proof" since no documents were tendered *in camera* for the trial and appellate court to review. Instead, the Court simply dismissed the claim concluding that there was no more than a "minor discrepancy" between the affidavits and trial testimony and Hood wanted to conduct a "fishing expedition" into Jones' attorney files. Did the Court avoid the analysis it properly applied *In re Small* to obtain a different result?

In *Ford,* while the jury was deliberating this products liability case, the presiding juror sent a note asking what the maximum amount was that could be awarded. Unsurprisingly the case promptly settled. However, after the jurors were dismissed, Ford interviewed the jurors and learned that they had found in favor of Ford on one issue and were

deliberating the second when the presiding juror sent the note without the knowledge of some jurors and over the objection of others. Ford asked to delay settlement to allow it or the court to take discovery from the jurors. The motion was denied. Ford lost in the court of appeals but the Texas Supreme Court reversed holding that:

- parties are "entitled to full fair discovery and to have their cases decided on the merits" *Id.* at 663
- "only in certain narrow circumstances is it appropriate to obstruct the search for truth by denying discovery" *Id.*
- "a trial court abuses its discretion when it denies discovery going to the heart of the party's case"
- Castillo's argument that Ford's request for discovery was after the agreed discovery deadlines is inappropriate since Ford's cause of action arose subsequent to the deadlines
- "the trial court's preemptive denial of discovery could have been proper only if there existed no possible relevant discoverable testimony, fact, or material to support or lead to evidence that would support a defense to Castillo's claim for

breach of contract" Id. at

- while Castillo complained that under accepted law Ford's suspicion it "might" uncover relevant evidence is insufficient; the facts here were not "sufficiently developed" nor was "all the relevant information at hand ..."
- error is harmful and appealable "when discovery is denied and because of the denial the evidence sought does not appear in the record, determining harm from the denial is impossible and the party is prevented from properly presenting its case on appeal."

Id.

Applying the *Ford* analysis to Hood should also have led to a different result. Hood and Whiteside were entitled to full, fair discovery in their search for the truth and to have their case decided on the merits. Discovery of Jones' employment statistics and "inclusion" department analyses and Jones' and its attorneys decisions to use seemingly fraudulent affidavits goes to the heart of the matter and prevents Hood and Whiteside from properly presenting their case on appeal. Hood's sanction claim did not arise until trial when

the discovery deadlines were closed. Rogers, who was not deposed prior to trial, testified, in contradiction to his affidavit, that he did not have the power to terminate Hood without following human resources' guidelines and obtaining their approval. The Court of Appeals did not have to engage in "wild speculation" to learn that Hood had been given no meaningful statistical information as to Jones' workforce during Hood's employment. Moreover, Hood was not engaged in a "fishing expedition" but only sought Jones' withheld documents be examined *in camera* to show whether Jones knew its summary judgment affidavits were false. Certainly an individual plaintiff in Texas is entitled to the same Due Process afforded a corporate defendant.

II. Funding for the Texas Supreme Court has led to preferential treatment for donors.

Finding the answer to these conflicting results can be found in the political makeup of the Texas Supreme Court. The Texas Supreme Court has become significantly one-sided twice in recent memory - the mid 1980s and currently. In 1987, 60

Minutes aired an episode on the Court, "Justice for Sale". At that time the Court had become exceedingly liberal, allegedly due to donations from trial lawyers and litigants.[1] More recently the Court has become very conservative. Currently all nine justices are Republicans, most having been appointed by the Republican Texas governor.[2] In the past, all justices were listed as Democrats,[2] although that was not necessarily indicative of their liberalism. Being a Republican did not become fashionable until the nineties. In both instances of the Court's departure from evenhanded justice, blame was placed on campaign financing.[3] Between

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1 See, e.g., Champagne, *The Selection and Retention of Judges in Texas*, 40 SWLJ 53, 84 (1986); Editorial in Texas, *Contempt of Court*, New York Times, November 5, 1987, at A34; *Quality of Justice: Texan Case Spotlights Question on Integrity of the Courts in Texas*. Wall Street Journal, November 4, 1987, at 1.

2 *Line of Succession of Supreme Court of Texas Justices from 1945: The Modern Court* (2009), http://www.supreme.courts.state.tx.us/court/sc-justices-1945-present-111406.pdf

3 *A Decade of Watching and Waiting: The Texas Supreme Court in Review 2005-2006,* Texas Watch Foundation, March 2007; Column, *Texas Justice for Sale? Judge for Yourself,* Houston Chronicle, Sept. 13, 1992, Outlook at 2; Court Watch, *The Food Chain: Winners and Losers in the Texas Supreme Court 1995-99*, at Chart 1 (May 1999); Editorial, *Texas Supreme Court Judges Should Disclose Votes. Senator Kirk Watson's Bill Would Reveal Justices' Votes on Petitions,* Austin American Statesmen, May 5, 2009; *Interested Parties: Who Bankrolled Texas' High-Court Justices in 2008?,* Texans for Public Justice, October 2009; *No End in Sight: Texas Supreme Court Maintains its Longstanding Tradition of Pro Defendant Bias 2006-2007,* Texas Watch Foundation Annual Report, August 27, 2008; *PAC*

1996 and 2008, Texas Court Watch has tracked the Plaintiff-Defendant wins showing a widening margin in the Defendant's favor since 2000-2001 with Plaintiff wins of 14% in 2006-2007 and 23% in 2007-2008.[4]

What this win-loss ratio does not reflect are the greater majority of cases, such as this one, decided by one of the fourteen Court of Appeals and denied review by the Supreme Court without opinion. The Court hears about 11% of the appeals it receives.[5]

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for Texas Doctors Gives to Court Hopefuls, Beaumont Enterprise, Oct. 14, 1988; *Shifting Sands for Consumers: Increased Control by Activists, Defection of Moderates Leaves Consumers Looking for Relief*, Texas Watch Foundation 2002-2003; Texas Watch Foundation, *Justice for Sale in Texas?*, KHOU (Houston, Texas), May 13, 2008; *The Texas Supreme Court by the Numbers: A Statistical Analysis of the Texas Supreme Court 2005-2006*, Texas Watch Foundation 2007

4 *Shining a Light: The Texas Supreme Court's Annual Report 2007-2008*, Texas Watch Foundation, 2009

5 Texans for Public Justice, *Courtroom Contributions Stain Supreme Court Campaigns*, (2008),

Interestingly, two of Texas' "watchdog" foundations appear to reflect the liberal or conservative bias of their benefactors. The Texans for Lawsuit Reform, in an article from November 2006, reported that Texans for Public Justice were funded by plaintiffs' lawyers.[6] In turn, Texans for Lawsuit Reform is apparently funded by the construction industry.[7]

III. *Caperton vs. A.T. Massey Coal, Inc.*, 556 US ___, 129 S.Ct. 2252 (2009) reaffirms that justice is not for sale.

Texas courts cannot charge admission for Due Process; Hood is entitled to the same meaningful opportunity to be heard accorded other litigants or their representatives who have funded judicial campaigns. This Court in *Marshall vs. Jerrico*, 446 US 238, 242 (1980) held:

> The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases.

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http://info.tpj.org/reports/courtroomcontributions/courtroomcontributions.pdf

6 *Texans for Public Justice Funded By Trial Lawyers*, TLR Press Release, November 2, 2006

7 *Leadership* (2006), http://www.tortreform.com/leaders

. . .

> The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law. See Matthews v. Eldridge, 424 U.S. 319, 344 (1976). At the same time, it preserves both the appearance and reality of fairness, 'generating the feeling, so important to a popular government, that justice has been done,' Joint Anti-Fascist Committee v. McGrath, 341 U.S. 123, 172 (1951) (Frankfurter, J., concurring), by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him.

Texas courts' predisposition to apply its laws only in favor of defendants deprives Hood and Whiteside of Due Process.

CONCLUSION

For foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Counsel for Petitioners

October 21, 2009

Supreme Court, U.S.
FILED

NO. 09-839 NOV 5 - 2009

OFFICE OF THE CLERK
William K. Suter, Clerk

In The
Supreme Court of the United States

SYBLE HOOD
AND TOM H. WHITESIDE,
Petitioners,

v.

EDWARD D. JONES & Co., L.P.
AND ROBBY ROGERS,
Respondents.

On Petition For A Writ of Certiorari
To The Eighth Court Of Appeals
of Texas

PETITION FOR WRIT OF CERTIORARI APPENDIX

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79408-2825
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Counsel for Petitioners

APPENDIX A

CAUSE NO. 14,971

SYBLE HOOD,	§	IN THE 109TH
Plaintiff,	§	DISTRICT COURT
v.	§	OF
EDWARD D. JONES	§	ANDREWS
& CO., L.P. §	§	COUNTY,
Defendants.	§	TEXAS

FINAL JUDGMENT

On the 24th day of October, 2006, this case was called for trial. Plaintiff appeared by and through her counsel of record, Tom H. Whiteside, of the Whiteside Law Firm. Defendant appeared by and through its counsel of record, R. Michael McCauley, Jr., of the firm of McWhorter, Cobb and Johnson, L.L.P. After a jury was impaneled and sworn, it heard the evidence and arguments of counsel. In response to the jury charge, the jury made findings that the court received, filed, and

entered of record. The questions submitted to the jury and the jury's findings are attached as Exhibit "A" and incorporated herein by reference for all purposes. Defendant Edward D. Jones & Co., L.P., made request of this Court for Judgment on the Verdict. The Court hereby renders Judgment for Defendant. It is therefore

ORDERED, ADJUDGED AND DECREED, that Plaintiff take nothing by her suit and that Defendant recover court costs from Plaintiff.

SIGNED ON THIS 3RD DAY OF JANUARY, 2007

/s/ James L. Rex

PRESIDING JUDGE

APPENDIX B

COURT OF APPEALS

EIGHTH DISTRICT OF TEXAS

EL PASO, TEXAS

	§	
IN RE: SYBLE HOOD,	§	No. 08-07-00068-CV
	§	AN ORIGINAL
	§	PROCEEDING
Realtor.	§	IN MANDAMUS
	§	
	§	

JUDGMENT

The court has considered this cause on the Realtor's petition for writ of mandamus against the Honorable Jams. L. Rex, Judge of the 109th District Court of Andrews, Texas, and concludes that Realtor's petition for writ of mandamus should be denied. We therefore deny the petition for writ of mandamus, in accordance with the option of this

court.

IT IS SO ORDERED THIS 22ND DAY OF MARCH, 2007.

/s/ Ann Crawford McClure

Justice, Court of Appeals for the

Eighth District of Texas

Before Chew, C.J., McClure, and Carr, JJ.

APPENDIX C

COURT OF APPEALS

EIGHTH DISTRICT OF TEXAS

EL PASO, TEXAS

	§	
IN RE: SYBLE HOOD,	§	No. 08-07-00068-CV
	§	AN ORIGINAL
	§	PROCEEDING
Realtor.	§	IN MANDAMUS
	§	
	§	

MEMORANDUM OPINION ON PETITION FOR WRIT OF MANDAMUS

Realtor, Syble Hood, seeks a writ of mandamus against the Honorable James L. Rex, Judge of the 109th District Court of Andrews County. Realtor has included a motion for emergency relief in her petition. Mandamus will lie only to correct a clear abuse of discretion. *Walker v.*

Packer, 827 S.W.2d 833, 840 (Tex. 1992) (orig. proceeding). Moreover, there must be no other adequate remedy at law. *Id.* Based on the petition and record before us, we are unable to conclude that Realtor is entitled to the relief requested. Accordingly, we deny mandamus relief and the request for emergency relief. *See* TEX.R.APP.P. 52.8(a).

/s/ Ann Crawford McClure

Ann Crawford McClure, Justice

March 22, 2007

Before Chew, C.J., McClure, and Carr, JJ.

APPENDIX D

THE STATE OF TEXAS

THE SUPREME COURT OF TEXAS
Orders Pronounced June 1, 2007

ORDERS ON PETITION FOR MANDAMUS

THE FOLLOWING PETITIONS FOR MANDAMUS

ARE DENIED:

07-0245 IN RE SYBLE HOOD, REALTOR

APPENDIX E

THE STATE OF TEXAS

THE SUPREME COURT OF TEXAS
Orders Pronounced July 27, 2007

ORDERS ON PETITION FOR MANDAMUS

THE FOLLOWING MOTIONS FOR REHEARING

ARE DENIED:

07-0245 IN RE SYBLE HOOD, REALTOR

APPENDIX F

CAUSE NO. 14,971

SYBLE HOOD,	§	IN THE 109TH
Plaintiff,	§	DISTRICT COURT
v.	§	OF
EDWARD D. JONES	§	ANDREWS
& CO., L.P. §	§	COUNTY,
Defendants.	§	TEXAS

ORDER DENYING PLAINTIFF'S MOTION FOR RELIEF UNDER TRCP 13 AND TRCP 166a(h)

On this day came on for consideration, Plaintiff's Motion for Relief Under TRCP 13 and TRCP 166a(h) filed October 27, 2006. This matter was originally scheduled for hearing on December 4, 2006, which hearing date was cancelled Plaintiff's counsel and rescheduled for hearing on February 14, 2007. The hearing was required to be rescheduled again which hearing ultimately occurred before this Court on October 16, 2007, at 1:00 p.m. Plaintiff

appeared by and through her counsel of record, Tom H. Whiteside, of the Whiteside Law Firm. Defendants appeared by and through their counsel of record, R. Michael McCauley, Jr. of the firm of McWhorter, Cobb and Johnson, L.L.P. After hearing arguments and evidence presented by counsel, the Court is of the opinion that Plaintiff's Motion for Relief Under TRCP 13 and TRCP 166a(h) should be in all things denied. It is therefore

ORDERED, ADJUDGED AND DECREED, that Plaintiff's Motion for Relief Under TRCP 13 and TRCP166a(h) is hereby in all things denied; it is further

ORDERED, ADJUDGED AND DECREED, that Plaintiff's Motion for Relief Under TRCP 13 and all supplements thereto were filed in violation of the Texas Rule of Civil Procedure 13 and TRCP 166a(h); it is further

ORDERED, ADJUDGED AND DECREED,

that Defendants are awarded attorneys' fees and expenses against Plaintiff's counsel and that Tom H. Whiteside of the Whiteside Law Firm shall tender to Defendants an amount of $3000 for attorneys' fees and an amount of $258.31 for attorney expenses, which amounts represent the fees and expenses incurred by Defendants as a result of Plaintiffs' Motion for Relief Under TRCP 13 and TRCP 166a(h) filed in violation of Texas Rule of Civil Procedure 13; it is further

ORDERED, ADJUDGED AND DECREED, that Defendants are awarded attorneys' fee and expenses against Tom H. Whiteside of the Whiteside Law Firm for any and all such cost incurred by Defendants for any appeal by Plaintiff of this Order in an amount up to $0, for each level of appeal, if Defendants prevail in the defense of such appeal; and it is further

ORDERED, ADJUDGED AND DECREED,

that all other relief requested by Plaintiff or Defendants not expressly granted herein is hereby denied.

SIGNED ON THIS 23RD DAY OF OCTOBER, 2007

/s/ James L. Rex

PRESIDING JUDGE

APPENDIX G

SYBLE HOOD, Appellant, v. EDWARD D. JONES & CO., L.P. AND ROBBY R. ROGERS, Appellees.

No. 08-07-00324

COURT OF APPEALS OF TEXAS, EIGHTH DISTRICT, EL PASO

2009 Tex. App. LEXIS 543

January 29, 2009, Decided

SUBSEQUENT HISTORY: Related proceeding at *Hood v. Edward D. Jones & Co., L.P., 2009 Tex. App. LEXIS 544 (Tex. App. El Paso, Jan. 29, 2009)*

PRIOR HISTORY: [*1]

Appeal from the 109th District Court of Andrews County, Texas (TC # 14,971).

JUDGES: Before Chew, C.J., McClure, J., and Barajas, C.J. (Ret.), sitting by assignment.

OPINION BY: ANN CRAWFORD McCLURE

OPINION

This appeal arises from a lawsuit filed by

Syble Hood against Edward D. Jones & Co., L.P. and Robby R. Rogers for wrongful discharge based on age discrimination. Summary judgment was granted in favor of Rogers on October 12, 2006. Two weeks later, Hood's claims against Jones were submitted to a jury, which returned a take-nothing judgment in Jones' favor. The next day, Hood sought relief pursuant to *Rule 166a(h)*[1] based on discrepancies between affidavits filed in support of Rogers' motion for summary judgment and trial testimony offered by rogers and other Jones' employees. She also filed a motion for sanctions pursuant to *Rule 13.* Over the next few months, Hood filed two supplements to these motions, a motion to compel discovery, two subpoenas *dueces tecum,* and additional request for production of

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1 ***Rule 166a(h)*** relates to summary judgment affidavits made in bad faith; "Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith . . . the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which caused him to incur, including reasonable attorney's fees . . ."
Tex.R.Civ.P. 166a(h)

documents. Appellees filed responses claiming attorney/client privilege, a motion to quash the subpoena *duces tecum,* a motion for protective order, and a request for expenses pursuant to *Rule 215.1(d).* Ultimately, [*2] the trial court denied relief to Hood and awarded attorney's fees and costs in favor of Appellees instead.[2] Hood and her attorney filed a joint notice of appeal. This appeal addresses only the denial of Hood's requested sanctions and the fees and costs awarded against her attorney.

FACTUAL SUMMARY

On April 18, 1990, Hood was employed as a Branch Office Administrator (BOA) of the Andrews, Texas office of Edward D. Jones & Co. She was 55 years old at the time she was hired. Robby Rogers was her manager and the Investment Representative [*3] for the office. Hood was fired on

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2 The propriety of the summary judgment in favor of Rogers and the denial of discovery under *Rule 166a(h)* are pending in a separate appeal before the Court, bearing cause number 08-07-00093-CV.

May 1, 1998 for insubordination, poor work performance, failure to perform ordered tasks, and absenteeism. On November 2, 1998, she filed suit alleging that she was wrongfully terminated based upon her age.[3]

The final judgment was signed January 3, 2007. Shortly thereafter, Hood filed a fifth request for production by which she sought:

Any documents in your "POSSESSION, CUSTODY, OR CONTROL" which reflect the IDENTITY of all persons or entities who participated in any way in drafting and/or making revisions to and final approval of Defendant, Robby Rogers' Motion for Lack of Jurisdiction and Motion for Summary Judgment and Brief in Support Thereof dated January 4, 2006 and the affidavits of Robby R. Rogers and Steve Rarick, attached as

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3 For our purposes here, an employer commits an unlawful employment practice if because of race, color, disability, religion, sex, national origin, or age the employer discharges an individual. *Tex.Lab.Code Ann. § 21.051* (Vernon 2006).

Exhibit A and B thereto including, but not limited to, faxing, mailing or emailing of the drafts of the same or the final drafts of the motion and affidavits and any discussions of and decisions [*4] made by and between McWhorter, Cobb & Johnson, L.L.P., Edward D. Jones & Co., L.P, Kimber Monroe, and/or the Edward D. Jones' legal department, Steve Rarick and Robby R. Rogers or any other person or entity, their representatives, agents, servants and employees.

Any documents in your "POSSESSION, CUSTODY, OR CONTROL" which reflect all discussions of and all decisions made regarding all drafts and/or revisions and final approval for Defendant, Robby Rogers' Motion for Lack of Jurisdiction and Motion for Summary Judgment and Brief in Support Thereof dated January 4, 2006 and the affidavits of Robby R. Rogers and Steve Rarick, attached as Exhibit A and B thereto

including, but not limited to, faxes, mailed documents, letters of transmittal, memos, notes, emails by and between McWhorter, Cobb & Johnson, L.L.P., Edward D. Jones & Co., L.P., Kimber Monroe and/or the Edward D. Jones' legal department, Steve Rarick and Robby R. Rogers or any other person or entity, their representatives, agents servants and employees.

Appellees responded that the documents requested were privileged under *Rule 192.5* and *Rule of Evidence 503.* Hood countered with a motion to compel production and a motion to [*5] submit the documents to an *in camera* review. Appellees filed a request for expenses pursuant to *Rule 215.1(d).* On February 22, 2007, the trial court signed orders denying Hood's motions.

SANCTIONS

The sole issue presented is whether the trial court erred in denying Hood's motion for sanctions

and in awarding attorneys' fees and expenses to Appellees. The decision to impose *Rule 13* sanctions lies within the trial court's sound discretion. *Mattly v. Spiegel, Inc. 19 S.W. 3d 890, 895 (Tex.App.-Houston [14th Dist.] 2000, no pet.).* We will not set aside a sanctions order absent an abuse of discretion. *Id.* A trial court abuses its discretion by (1) acting arbitrarily and unreasonably, without reference to any guiding rules or principles, or (2) misapplying the law to the established facts of the case. *Downer v. Aquamarine Operators, Inc., 701 S.W. 2d 238, 241-42 (Tex. 1985).* We will overturn a trial court's discretionary ruling only when it is based on an erroneous view of the law or a clearly erroneous assessment of the evidence. *Id.* Our review encompasses an examination of the entire record. *Mercedes-Benz Credit Corp. v. Rhyne, 925 S.W. 2d 664, 666 (Tex. 1996).*

Rule 13 requires that a party [*6]

demonstrate that the pleadings are groundless, or that the opposing party brought the claim in bad faith or to harass the party. *Tex.R.Civ.P. 13.* "One purpose of the rule is to check abuses in the pleading process; that is, to ensure that at the time the challenged pleading was filed, the litigant's position was factually grounded and legally tenable." *Appleton v. Appleton, 76 S.W. 3d 78 86-87 (Tex.App. -Houston [14th Dist.] 2002, no pet.), citing Mattly v. Spiegel, Inc. 19 S.W. 3d 890, 896 (Tex.App. -Houston [14th Dist.] 2000, no pet.).* The trial court must examine the facts and circumstances in existence at the time the pleading was filed to determine whether *Rule 13* sanctions are proper. *Id.* Bad faith does not exist when a party merely exercises bad judgment or is negligent; rather, "it is the conscious doing of a wrong for dishonest, discriminatory, or malicious purposes." *Id.* Courts must presume the papers are filed in good faith, and the party moving

for sanctions bears the burden of overcoming this presumption. *Id.*

Denial of Hood's Request for Sanctions

At the hearing on Hood's motion, her attorney admitted that he had no evidence to support his claim that Appellees should be sanctioned. [*7] He testified to his personal belief that the affidavits were intentionally drafted so that Rogers could prevail on his motion for summary judgment. Counsel argued that someone had made the decision to include statements in the affidavits that were not true. Thus, he needed post-judgment discovery of the attorneys' files to gather the evidence he believed would establish bad faith. Once he found the evidence of bad faith, he could support his request for sanctions.

Hood had requested post-judgment relief under *Rule 13* and *Rule 166a(h)*. Her request derives from the purported contradiction between

affidavits in support of Rogers' motion for summary judgment and trial testimony of Rogers, Rarick, and Kranzberg. Simply stated, the issues is whether Rogers had the right to terminate employees without approval of the Human Resources Department. Hood alleges that the affidavits were not the result of mere bad judgment and negligence, but were consciously drafted and executed to obtain dismissal of the claims against Rogers, with Jones' employees knowing full well the statements were false. Appellees respond that the affidavits are not false merely because Jones has procedures in place requiring [*8] ratification by Human Resources. Alternatively, they argue that even if the statements were contradictory, it is not an indication of dishonesty or bad faith. *Appleton, 76 S.W. 3d at 86-87.* It is "the conscious doing of a wrong for dishonest, discriminatory, or malicious purpose," which must be shown for relief under *Rule 13.*

Campos v. Ysleta General Hosp., Inc., 879 S.W. 2d 67, 71 (Tex.App. -El Paso 1994, writ denied).

The trial court's decision to deny post-judgment discovery is not at issue in this appeal. Here, Hood only challenges the trial court's denial of her request for sanctions. In the absence of any evidence to support the sanctions ,we are hard pressed to conclude that the trial court abused its discretion.

Award of Fees and Costs

Hood briefly attacks the award of fees and costs, which she characterizes as *Rule 13* sanctions. She argues that Appellees were required to demonstrate bad faith and she complains that the trial court failed to identify any sanctionable conduct. Actually, Appellees requested relief pursuant to *Rule 215.1(d),* which provides in pertinent part:

(d) *Disposition of Motion to Compel: Award of*

Expenses.

. . .

If the motion is denied, the court may, after opportunity [*9] for hearing, require the moving party or attorney advising such motion to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

The motions to compel and the motion for sanctions were filed by Hood. The trial court denied the motions and then considered Appellees' request for expenses. In determining the amount of attorneys' fees and reasonable expenses, the rule requires the court to "award expenses which are reasonable in relation to the amount of work reasonably expended in obtaining an order

compelling compliance or in opposing a motion which is denied." *Tex.R.Civ.P. 215.1(d)*. Counsel for Jones testified that his firm had incurred $9,050 in attorneys' fees and $258.31 in expenses related to Hood's motions. The trial court ordered that Hood's attorney pay to Appellees $3,000 in fees and $258.31 in expenses, the reasonableness of which is not questioned here. Finding no abuse of discretion, we overrule the sole issue and affirm the judgment of the trial court. [*10] below.

ANN CRAWFORD McCLURE, Justice

January 29, 2009

APPENDIX H

Court of Appeals of Texas,

El Paso.

Syble HOOD, Appellant,

v.

EDWARD D. JONES & CO., L.P. and Robby R.

Rogers, Appellees.

No. 08-07-00093-CV.

Jan. 29, 2009

Rehearing Overruled March 4, 2009.

OPINION

ANN CRAWFORD McCLURE, Justice.

*1 This appeal arises from a lawsuit filed by Syble Hood against Edward D. Jones & Co., L.P. and Robby R. Rogers for wrongful discharge based on age discrimination. Summary judgment was granted in favor of Rogers on October 12, 2006. Two weeks later, Hood's claims against Jones were submitted to a jury, which returned a take-nothing

judgment in Jones' favor. The next day, Hood sought relief pursuant to Rule 166a(h)[FN1] based on discrepancies between affidavits filed in support of Rogers' motion for summary judgment and trial testimony offered by Rogers and other Jones' employees. She also filed a motion for sanctions pursuant to Rule 13. Over the next few months, Hood filed two supplements to these motions, a motion to compel discovery, two subpoenas *dueces tecum* [sic], and additional requests for production of documents. Appellees filed responses claiming attorney/client privilege, a motion to quash the subpoenas *duces tecum*, a motion for protective order, and a request for expenses pursuant to Rule 215.1(d). Ultimately, the trial court denied relief to Hood and awarded attorneys' fees and costs in favor of Appellees instead.[FN2] Hood and her attorney filed a joint notice of appeal. This appeal addresses only the summary judgment granted in favor of Rogers

and the denial of discovery under Rule 166a(h).

FACTUAL SUMMARY

On April 18, 1990, Hood was employed as a Branch Office Administrator (BOA) of the Andrews, Texas office of Edward D. Jones & Co. She was 55 years old at the time she was hired. Robby Rogers was her manager and the Investment Representative for the office. Hood was fired on May 1, 1998 for insubordination, poor work performance, failure to perform ordered tasks, and absenteeism. On November 12, 1998, she filed suit alleging that she was wrongfully terminated based upon her age. [FN3] In response to discovery requests, Appellees produced the names of all persons over fifty years of age who had been terminated by the company since 1990. Hood then requested, in electronic format, the following information from 1990 forward:

- the ages of all employees for each year;

- the gender of all employees for each year;
- the ages and gender for each job classification;
- any other data regarding company employees including age, sex, classification, hires, fires, retirements and terminations for any other reason;
- any analysis, assessment and/or survey made by the company regarding any of the above categories;
- company personnel or Human Resources practice and procedures manuals or any other documents which set forth the company's procedures regarding personnel including, but not limited to, hiring, firing, assessments of abilities, annual review, and prevention of age discrimination.

Appellees objected that the request was unduly burdensome; that the information had already been provided by hard copy; and that they did not have the ability to generate an electronic

version from the software system information.

*2 Some months later, Hood requested data concerning the termination of all BOAs since 1990 within all age groups. Appellees objected that this request was overbroad, burdensome, harassing, and irrelevant. At this point, Hood filed a motion to compel, arguing that the data was necessary to establish a statistical profile and to show that the company discharged BOAs at a higher rate once they passed age forty. Appellees objected again and estimated that compliance with the request would cost $12,365. [FN4]

On June 16, 2005, Hood filed an amended motion to compel in which she argued that a recent United States Supreme Court case stood for the proposition that disparate impact theory can be used in age discrimination cases, thus requiring the production of data for the termination of company employees over fifty years of age. *See Smith v. City*

of Jackson, 544 U.S. 228, 125 S.Ct. 1536, 161 L.Ed.2d 410 (2005). The trial court granted the motion in part, and required Appellees to provide a list, by hard copy and e-mail if possible, of all employees between the ages of forty and fifty whose employment had been terminated between 1990 and 1999.

PROPRIETY OF SUMMARY JUDGMENT

[1][2][3][4][5] In her first issue for review, Hood complains of the summary judgment granted in favor of Rogers. We review a summary judgment *de novo. Valence Operating Co. v. Dorsett,* 164 S.W. 3d 656, 661 (Tex. 2005). The appropriate standard for a traditional summary judgment asks whether the movant carried the burden of showing that there is no genuine issue of material fact, so that judgment should be granted as a matter of law. *Diversicare Gen. Partner, Inc. v. Rubio,* 185 S.W. 3d 842, 846 (Tex. 2005); *De Santiago v. West Tex. Cmty.*

Supervision & Corr. Dep't, 203 S.W. 3d 387, 398 (Tex. App. -El Paso 20065, no pet.). We consider all the evidence in the light most favorable to the non-movant, indulging every reasonable inference in favor of the non-movant and resolving any doubts against the motion. *Goodyear Tire & Rubber Co. v. Mayes*, 236 S.W. 3d 754, 756 (Tex. 2007). We also consider whether reasonable and fair-minded jurors could differ in their conclusions in light of all the evidence presented. *Id.* at 755. Where, as here, a trial court does not specify the grounds upon which it relied in granting a summary judgment, we will affirm if any ground is meritorious. *See Harwell v. State Farm Mut. Auto Ins. Co.*, 896 S.W. 2d 170, 173 (Tex. 1995).

Hood sued Rogers for intentional interference with her contractual relationship with Edward D. Jones & Co. In his motion for summary judgment, Rogers argued (1) that he could not be sued in his

individual capacity under the Texas State Commission on Human Rights Act (TCHRA);[FN5] (2) that Hood had no enforceable contract with Jones; and (3) that Rogers was legally justified in terminating Hood. To prevail, Rogers needed to demonstrate that either no contract existed between Hood and Jones or that Rogers, as Jones' agent, could not have intentionally interfered with a contract between Jones and Hood.[FN6] If a contractual relationship did exist, Rogers would have to show that he was legally justified in interfering with another party's contract.

*3[6][7][8][9] Tortious interference with a contractual relationship requires a plaintiff to prove: (1) an existing contract subject to interference; (2) an intentional and willful act of interference; (3) proximate cause; and (4) actual damages. *Holloway v. Skinner,* 898 S.W. 2d 793, 795-96 (Tex. 1995); *Aguilar v. Morales,* 162 S.W. 3d 825, 837 (Tex. App. -

El Paso 2005, pet. denied). Texas strictly follows the employment-at-will doctrine. *Montgomery County Hosp. Dist. v. Brown,* 965 S.W. 2d 501, 501 (Tex. 1998); *East Line & Red River Ry. Co. v. Scott,* 72 Tex. 70, 10 S.W. 99, 102 (1888). "For well over a century the general rule in this State, as in most American jurisdictions, has been that absent a specific agreement to the contrary, employment may be terminated by the employer or the employee at will, for good cause, bad cause, or no cause at all." *Montgomery County Hosp. Dist.,* 965 S.W. 2d at 502. Both Rogers and Steve Rarick, Senior Human Resources Generalist at the home office in Missouri, testified by affidavit that Hood was an at-will-employee and had no employment contract. Thus, Hood was subject to discharge for any reason unless prohibited by Texas or federal law.

[10][11][12] Citing *James E. Sterner v. Marathon Oil Company,* 767 S.W. 2d 686, 689 (Tex.

1989), Hood contends that her at-will employment relationship was subject to tortious interference. In *Sterner,* the court determined that third persons may tortiously interfere with an at-will contract that has yet to be terminated. *Id.* Other courts have held that *Sterner* is only applicable when third parties interfere with a contract between two independent entities or persons. *Atlas Copco Tools, Inc. v. Air Power Tool & Hoist, Inc.,* 131 S.W. 3d 203, 208 (Tex. App. -Fort Worth 2004) (recognizing *Sterner* applies only to third-party tortfeasors); *Kadco Contract v. Dow Chemical Co.,* 198 F.3d 241 (5th Cir. 1999) (holding that *Sterner* only applies to third party tortiously interfering with a person's at-will employment status). In Texas, a party cannot tortiously interfere with a contract to which he is already a party. *Hussong v. Schwan's Sales Enterprises, Inc.,* 896 S.W.2d 320, 326 (Tex.App. -Houston [1st Dist.] 1995, no pet); *Schoellkopf v.*

Pledger, 778 S.W. 2d 897, 902 (Tex. App. -Dallas 1989, writ denied); *Frost Nat. Bank v. Matthews,* 713 S.W. 2d 365, 369 (Tex. App. -Texarkana 1986, writ refused n.r.e.). For liability to attach, Rogers must have acted outside the scope of his employment. The record does not support this conclusion. Rogers was Jones' investment representative. When a corporate representative is acting within the scope of his employment, he cannot tortiously interfere with a contract between his employer and another individual or entity. *Gonzalez v. Gutierrez,* 694 S.W. 2d 384, 388-89 (Tex. App. -San Antonio 1985, no writ).

We come now to the purported discrepancies between the summary judgment affidavits. Rogers attested in his affidavit that:

*4 As the Investment Representative, I was responsible for the management of the Andrews branch office and I was the highest ranking

employee in that office. My responsibilities included human resource decision-making, including hiring and terminating of personnel and evaluations of employee work performance for employees under my supervision through ratification of Human Resources of Edward Jones.

. . .

On May 1, 1998, due to her failure to improve her job performance, as part of my job responsibilities for Edward Jones, I terminated Ms. Hood for insubordination, poor work performance, failure to perform ordered tasks and absenteeism, which was ratified be Mare [sic] Krantzberg [sic] in Human Resources at Edward Jones.

Steve Rarick stated in his affidavit that:

As the Investment Representative, Rogers was responsible for managing the branch office and was the highest ranking employee in that office. Rogers' responsibilities included human resource

decision-making, which included hiring and firing of personnel and evaluations of employee work performance for employees under his supervision. Rogers was responsible for making all personnel decisions related to employees at the Andrews Branch Office of Edward Jones.

Rarick's affidavit makes no mention of the necessity of Human Resources to approve or ratify employment decisions. Mary Kranzberg, a Human Resources Generalist at the home office, testified by deposition included in the summary judgment record that company policy required Rogers to obtain counseling and approval before discharging an employee. Rogers sought counseling and maintained extensive communications with Human Resources regarding Hood's employment situation. Rogers sought counseling and maintained extensive communications with Human Resources regarding Hood's employment situation, which Kranzberg

documented in her office notes. On May 6, 1997, Rogers contacted Kranzberg to discuss the progressive discipline process. Rogers indicated that his performance review should serve as a verbal warning with an expected improvement time frame of six months. Kranzberg encouraged Rogers to document his problems with Hood. On April 2, 1998, Kranzberg noted that she would prepare a final written warning based on the information Rogers sent her, provided it was warranted. On April 20, 1998, Kranzberg indicated in her notes that "Robby and I served the final written warning to Syble," and she placed a call to Rogers and Hood to discuss it. During the telephone conference, she advised that the company allows each and every Investment Representative to practice his own management style as long as it is not illegal or unethical.

The record reveals that Rogers followed the

proper "chain of command" required by company policy and did not act outside the scope or authority of his employment. Because Rogers was acting on behalf of the company, summary judgment was properly granted. We overrule Issue One.

DENIAL OF DISCOVERY

[13][14] We review discovery rulings for an abuse of discretion. *Owens-Corning Fiberglas Corp. v. Malone,* 972 S.W. 2d 35,42 (Tex. 1998); *Texas Dep't of Transp. v. Able,* 35 S.W. 3d608, 617 (Tex. 2000); *Avary v. Bank of Am., N.A.,* 72 S.W. 3d 779, 787 (Tex. App. -Dallas 2002, pet. denied). The oft-repeated standard is whether the trial court acted without reference to any guiding rules or principles. *See Downer v. Aquamarine Operators, Inc.,* 701 S.W. 2d 238, 241-42 (Tex. 1985). Absent a clear abuse of discretion, the trial court's ruling will not be disturbed on appeal.

Denial of Statistical Data

*5 [15] In Issue Two, Hood complains of the limitations the trial court placed upon discovery of statistical data. We understand the need for data to show a statistical profile in age discrimination claims. *Smith,* 544 U.S. at 228, 125 S. Ct. 1536 (finding disparate impact theory is applicable in age discrimination claims). In November 1999, Appellees provided Hood with the names and locations of all persons over fifty years of age who had been terminated by the company since 1990. Hood first sought the data for **all** employees discharged from 1990 forward via a motion to compel filed on July 7, 2000. She filed an amended motion to compel on June 16, 2005. She complains in her appellate brief that the trial court did not order the production of discharged employees between forty and fifty years of age until the day the jury trial began such that she could not make use of it during the presentation of her case. Appellees

take serious issue with this statement ,insisting that while the trial court signed the order that date, Appellees had already provided the documentation requested one year earlier. Hood has not disputed that assertion. Moreover, in her own time line included in her briefing, Hood lists no activity between June 14, 2001 and June 16, 2005. She has argued that issuance of the *Smith* opinion changed the dynamics of age discrimination lawsuits, but she admits that *Smith* applied to employees over the age of fifty. She had been in possession of that information since late 1999.

Hood argues that she needed the data concerning terminated employees in all age groups, but she does not detail the statistical analysis of the data she has already obtained. Were she to point to a trend of increasing termination contemporaneous with advancing age, we might be more inclined to agree. In the absence of any attempt by her to do so,

we decline to engage in wild speculation as to what the documents produced actually showed or that additional discovery was necessary to a proper presentation of her case. Because the trial court ordered significant and sufficiently tailored discovery, we perceive no abuse of discretion. We overrule Issue Two.

Denial of Discovery Related to Hood's Request for Sanctions

[16][17][18] Hood requested post-judgment relief under rules 13 and 166a(h). Rule 13 prohibits the filing of fictitious pleadings. We presume that all pleadings, motions, and other papers are filed in good faith, and except for good cause, sanctions may not be imposed. the burden is on the moving party to overcome this good faith presumption. *GTE Comms. v. Tanner,* 856 S.W. 2d 725, 731 (Tex. 1993). Under Rule 166a(h), if summary judgment affidavits are filed in bad faith or solely for the purpose of

delay, the court can award treasonable expenses which the filing of the affidavits caused the non-offending party to incur. In Issue Three, Hood challenges the denial of discovery necessary to her request for sanctions.

[19] Hood's request here also derives from the purported contradiction between affidavits in support of Rogers' motion for summary judgment and trial testimony of Rogers, Rarick, and Kranzberg. Simply stated, the issue is whether Rogers had the right to terminate employees without approval of the Human Resources Department. Hood alleges that the affidavits were not the result of mere bad judgment and negligence, but were consciously drafted and executed to obtain dismissal of the claims against Rogers, with Jones' employees knowing full well the statements were false. Appellees respond that the affidavits are not false merely because Jones has procedures in place

requiring ratification by Human Resources. Alternatively, they argue that even if the statements were contradictory, it is not an indication of dishonesty or bad faith. *Appleton v. Appleton,* 76 S.W. 3d 78, 86-87 (Tex. App. -Houston [14th Dist.] 2002, no pet.). It is "the conscious doing of a wrong for dishonest, discriminatory, or malicious purpose" which must be shown for relief under Rule 13. *Campos v. Ysleta General Hosp., Inc.,* 879 S.W. 2d 67, 71 (Tex. App. -El Paso 1994, writ denied).

*6 We find no abuse of discretion in the denial of post-judgment discovery. Hood is unable to point to more than a minor discrepancy between the affidavits and trial testimony, and the witnesses were available for vigorous cross-examination. Counsel has admitted that he had no evidence to support his motion for sanctions. The purpose of Rule 166a(h) is not served by allowing Hood to peruse the attorneys' files in a fishing expedition

launched the day after the jury returned a verdict against her. We overrule Issue Three and affirm the trial court's judgment.

BARAJAS, C.J. (Ret.) sitting by assignment.

FN1. Rule 166a(h) relates to summary judgment affidavits made in bad faith: "Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith . . . the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees . . . " TEX.R.CIV.P. 166a(h)

FN2. The denial of Hood's motion for sanctions, and the award of fees and costs to Appellees are pending in a separate appeal before the Court, bearing cause number 08-07-00324-CV.

FN3. For our purposes here, an employer commits an unlawful employment practice if because of race, color, disability, religion, sex, national, origin, or age the employer discharges an individual. TEX.LAB.CODE ANN. § 21.051 (Vernon 2006).

FN4. The computer servers at the company contained the records of over 50,000 employees and the data sought would produce some 9,000 pages of documents.

FN5. The powers and duties exercised by the Commission on Human Rights are now exercised by the Texas Workforce Commission (TWC).TEX.LAB.CODE Ann. § 21.0015 (Vernon 2006).

FN6. Hood conceded in her response that Rogers could not be held individually liable for an age discrimination claim under TEX.LAB.CODE ANN. § 21.051.

APPENDIX I

COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS

EL PASO, TEXAS

SYBLE HOOD,	§	No. 08-07-00324-CV
Appellant,	§	Appeal from the
v.	§	109th District Court
EDWARD D. JONES & CO., L.P. AND ROBBY R. ROGERS,	§	of Andrews County, Texas
Appellees.	§	(TC #14,971)

ORDER

The Court has considered Appellant's motion for rehearing and concludes that the motion should be denied.

IT IS SO ORDERED THIS 4TH DAY OF MARCH, 2009.

/s/ Ann Crawford McClure

ANN CRAWFORD McCLURE, Justice

Before Chew, C.J., McClure, J. and Barajas, C.J. (Ret.)

Barajas, C.J. (Ret.), sitting by assignment, not participating

APPENDIX J

COURT OF APPEALS

EIGHTH DISTRICT OF TEXAS

EL PASO, TEXAS

SYBLE HOOD,	§	No. 08-07-00093-CV
Appellant,	§	Appeal from the
v.	§	109th District Court
EDWARD D. JONES & CO., L.P. AND ROBBY R. ROGERS,	§	of Andrews County, Texas
Appellees.	§	(TC #14,971)

ORDER

The Court has considered Appellant's motion for rehearing and concludes that the motion should be denied.

IT IS SO ORDERED THIS 4TH DAY OF MARCH, 2009.

/s/ Ann Crawford McClure

ANN CRAWFORD McCLURE, Justice

Before Chew, C.J., McClure, J. and Barajas, C.J. (Ret.)

Barajas, C.J. (Ret.), sitting by assignment, not participating

APPENDIX K

THE STATE OF TEXAS

THE SUPREME COURT OF TEXAS

Orders Pronounced June 12, 2009

ORDERS ON PETITION FOR REVIEW

THE PETITIONS FOR REVIEW OF THE FOLLOWING PETITIONS FOR REVIEW ARE DENIED:

09-0331 SYBLE HOOD v. EDWARD D. JONES & CO., L.P. AND ROBBY R. ROGERS from El Paso Count; 8th district (08-07-00324-CV, ___SW3d ___, 01-29-09)

APPENDIX L

THE STATE OF TEXAS

THE SUPREME COURT OF TEXAS

Orders Pronounced June 12, 2009

ORDERS ON PETITIONS FOR REVIEW

THE PETITIONS FOR REVIEW OF THE FOLLOWING PETITIONS FOR REVIEW ARE DENIED:

09-0332 SYBLE HOOD AND TOM H. WHITESIDE v. EDWARD D. JONES & CO., L.P. AND ROBBY R. ROGERS from El Paso Count; 8th district (08-07-00093-CV, ___SW3d ___, 01-29-09)

APPENDIX M

THE STATE OF TEXAS

THE SUPREME COURT OF TEXAS

Orders Pronounced August 7, 2009

ORDERS ON MOTION FOR REHEARING

THE MOTIONS FOR REHEARING OF THE FOLLOWING PETITIONS FOR REVIEW ARE DENIED:

09-0331 SYBLE HOOD v. EDWARD D. JONES & CO., L.P. AND ROBBY R. ROGERS from El Paso Count; 8th district (08-07-00324-CV, ___SW3d ___, 01-29-09)

APPENDIX N

THE STATE OF TEXAS

THE SUPREME COURT OF TEXAS

Orders Pronounced August 7, 2009

ORDERS ON MOTION FOR REHEARING

THE MOTIONS FOR REHEARING OF THE FOLLOWING PETITIONS FOR REVIEW ARE DENIED:

09-0332 SYBLE HOOD AND TOM H. WHITESIDE v. EDWARD D. JONES & CO., L.P. AND ROBBY R. ROGERS from El Paso Count; 8th district (08-07-00093-CV, ___SW3d ___, 01-29-09)

APPENDIX O

United States District Court, D. Nebraska.

Katherine K. BOYER, Plaintiff,

v.

EDWARD D. JONES & CO., L.P., d/b/a Edward Jones, and Calvin A. Robinson, Defendants.

No. 7:01CV5008

March 31, 2003.

Name Expert: Daniel M. Wilson, M.D., Ph.D.

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MEMORANDUM AND ORDER ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

LAURIE SMITH CAMP, District Judge.

*1 This matter is before the Court on the

Defendants' Motion for Summary Judgment on Claims I through IV of the Amended Complaint (Filing No. 54). Both parties have briefed the motion and submitted evidence in support of their respective positions (Filing Nos. 56 and 58-64). For the reasons provided below, the Court will grant the motion as it relates to the wrongful discharge claim of Count I of the Amended Complaint and deny the motion as it relates to Counts II, III, and IV of the Amended Complaint.

Procedural Background

On July 20, 2001, Plaintiff Katherine Boyer filed a petition in the District Court of Lincoln County, Nebraska, alleging that the Defendants Edward D. Jones & Co. ("Edward Jones") and Calvin Robinson wrongfully discharged her from her employment and failed to pay her for overtime that she had worked, and in so doing, violated state and federal laws. The Defendants removed the action on

August 16, 2001, pursuant to 28 U.S.C. § § 1331, 1441(c) and 1446(b). (Filing No. 1). On September 14, 2001, the Defendants moved to dismiss certain counts of the Complaint, and before the Court ruled on the motion, Boyer filed an Amended Complaint. The Court found taht the Amended Complaint rendered moot the Defendants' Motion to Dismiss and denied it. The Defendants filed a motion for reconsideration of that order, and the Court now denies the motion to reconsider as moot for the reasons provided herein on the Defendants' Motion for Summary Judgment. In effect, the proceedings have been stayed pending resolution of the summary judgment motion (Filing No. 70).

Factual Background

Edward Jones is a full-service retail brokerage firm. In 1985, after 18 years of employment with her former employer which had gone out of business, Katherine Boyer began looking for

employment. She applied for a job as a Branch Office Administrator at Edward Jones' North Platte, Nebraska, office. Boyer was interviewed for the position by Investment Representative Calvin Robinson, who would directly supervise the employee who filled the position.

During the interview, Robinson explained the job responsibilities, which included daily work on the Edward Jones computer system, answering the telephone, mail responsibilities, and arranging appointments with customers. (Boyer Dep. [FN1] at 64-65, 73-74; and Ex. 4). According to Boyer, Robinson explained to her that he was just starting the Edward Jones' office in North Platte, and he promised that if she stuck with him through tough times, then she would have permanent employment with Edward Jones as his assistant until her retirement. (*Id.* at 65-66). Boyer states that Robinson also promised her health insurance and

other employment benefits, including a 10-percent share of his periodic profitability bonuses, known as trimester profitability bonuses, if he were to earn them in the future. *Id.,* and at 85.

FN1. All references in the memorandum to deposition testimony will provide the witness's last name and page number to the deposition transcript. The transcripts are located in the record as follows: Pavlik and Armstead at Filing No. 56, Tabs G, K & L; Boyer at Filing Nos. 59-60; Robinson at Filing Nos. 61-62; Kadlecek at Filing No. 63; and Steve Rarick at Filing No. 64.

Accordingly to Edward Jones' policy, whether investment representatives pay a trimester profitability bonus to their own office administrators is a matter left wholly in the investment representative's discretion. (*Id.* at 83-87; Boyer Ex. 2). Boyer concedes that she had no

assurance that she would receive a trimester profitability bonus, and that it was dependent upon Robinson's profitability. (*Id.* at 85). Boyer's only claim to the bonus is through the representation that Robinson made to her at the time of her hiring. (*Id.* and 278).

*2 Boyer states that she relied on Robinson' promises when foregoing other employment opportunities and when accepting the position with Edward Jones. (*Id.* at 59-62). Boyer never received anything in writing stating that she could work for Edward Jones until she chose to retire, and she never received anything in writing that she would receive any specific level of bonus. (*Id.* at 72, 86, 202-3). Boyer has admitted that she knew that she could resign any time she wanted to resign, and she acknowledged that Edward Jones could have terminated her employment at any time. (*Id.* at 114-6, 201).

Boyer worked for Edward Jones and as Robinson's assistant from 1985 through February 14, 2000. During that period, Boyer Received annual performance evaluations from Robinson. For every year through 1998, Boyer received excellent performance evaluations from Robinson and always received the highest performance rating from Robinson. (Robinson Dep. at 42-63).

Boyer acknowledges that, on a few occasions, she agreed that Robinson could change their agreement on the bonus award. For example, there were times between 1985 and 2000 when Boyer told Robinson that he could raise her base rate of pay and forgo paying her a trimester profitability bonus. (Boyer Dep. at 184-85).

In 1997, a representative from Edward Jones inquired about the amount of overtime hours that Boyer had worked but for which she had not been paid. As a result of the company's inquiry, Edward

Jones compensated Boyer for the overtime she had worked but had not paid in 1997. (Robinson at 78-80). In 1998, Boyer claimed 2.5 hours of overtime per week, even though she had worked more overtime than claimed, because she understood that 2.5 hours was the maximum amount that she could claim. When, in January 1999, Robinson learned that she had claimed 2.5 hours of overtime per week in 1998, Boyer states that he confronted her about it, slammed his fist on the desk, and ordered her not to claim any more overtime because the overtime compensation that she received diminished Edward Jones' calculation of Robinson's overall income and profitability. (*Id.* at 95). After that conversation, although Boyer continued to work overtime hours, she did not claim them. (*Id.* at 97).

In January 1998, Jean Pavlik, who had been trained by Edward Jones in its St. Louis office, was assigned to be a second investment representative

for Edward Jones' North Platte office. For a time, Boyer was the office assistant for both Robinson and Pavlik. (Robinson Dep. at 93-94). In March 1998, Pavlik recommended that Connie Kadlecek, a 32-year-old female, be hired by Edward Jones as Pavlik's office assistant. Edward Jones approved the hire. (*Id.* and Pavlik Dep. at 11-12; Boyer Dep. at 127, 129-130). Kadlecek is a Nebraska native who had worked for approximately two years as a branch office administrator in an Edward Jones office in Colorado, and she was seeking to relocate back to Nebraska. (Kadlecek Dep. at 4-5).

*3 In May 1999, more than a year after Kadlecek had begun working at the North Platte office, Boyer took an annual vacation. When she returned to work, Kadlecek told her that in Boyer's absence, Robinson, Pavlik and she had a discussion about work assignments and they had decided that Kadlecek should take Boyers' job. (Boyer Dep. at

210). Kadlecek never stated when the transition was to occur, and Boyer testified that she thought Kadlecek was joking at the time she made the comment. (*Id.* at 212, 217).

In early 2000, Boyer discovered through checking her income tax records that she had been awarded fewer in bonuses for 1999 than she had been awarded in 1998 even though the North Platte office's profitability was greater in 1999 than in 1998. (*Id.* at 144-454). When Boyer asked Robinson the reason for the decrease, he told her that he had awarded a portion of her 10-percent profitability bonus to Kadlecek. (*Id.* at 148-49).

On February 9, 2000, Boyer and Robinson met again to discuss the profitability bonus awards. Robinson explained to Boyer that her had given a portion of the bonus to Kadlecek because Boyer had taken a ten week sick leave in 1999, and Kadlecek had performed Boyer's job duties during that leave.

(*Id.* at 149). Boyer told him that she had taken only nine weeks of leave, not ten weeks, and that she felt she was being punished for taking leave. (*Id.* at 150, 223-224). Robinson told Boyer to check with Edward Jones' branch office administrators in McCook and Grand Island to learn how much compensation they earned, because he was willing to make her the best paid office administrator in the region. (*Id.* at 163-64). When she checked with other Edward Jones' office administrators throughout Nebraska, she learned that she was not the best paid office administrator in the region.

According to Robinson, he told Boyer during that meeting that his payment to her of a share of his trimester profitability bonus was discretionary, and that he paid the bonus for showing up and working. To this comment, Boyer responded that maybe he should give her two weeks notice that she was quitting. (Robinson Dep. at 163). Boyer denies

that she ever threatened to quit- on that day or any day. (Boyer Dep. at 152).

On February 9 and 10, Boyer sold $43,000 in investments to pay off her margin account. (*Id.* at 155-59). On February 10, Kadlecek overheard Boyer talking on the phone. (Kadlecek Dep. at 66-67). During the conversation, Kadlecek heard Boyer say that if Robinson did not pay her the commission that she was owed, she would quit at the worst possible time for Robinson, in the middle of tax season. (*Id.* at 24-25, 27). Kadlecek reported what she had heard to Pavlik, who, in turn, told Robinson. (*Id.* at 24-25; Pavlik Dep. at 66-67).

Robinson and Boyer had another meeting to discuss Boyer's 1999 bonus on February 14, 2000. During that meeting, Robinson advised Boyer that he would not change the 1999 bonus payments, and that she would not receive a full 10 percent of the trimester profitability bonus for 1999. In response,

Boyer told him that she had 28 days of sick leave accumulated and five weeks of vacation, and that she was taking a few sick days. Robinson told her she could not use her sick time to leave work because she was not sick. Robinson told him that she had lost sleep the previous weekend, that she was sick, and that she was taking a couple days off for sick leave. According to Boyer, Robinson then told her to take her things with her when she left, which she interpreted to mean that she was being fired. According to Boyer, Robinson also said that if she tried to take any accounts with her when she left, Edward Jones would sue her. (*Id.* at 186-191, 276).

*4 Robinson recalled this key conversation differently. Robinson recalled that he asked Boyer whether she was coming back after her sick leave, and Boyer said, "no." (Robinson Dep. at 171-72; 220-21). Robinson testified that he considered Boyer's

departure a voluntary resignation, and he contacted Edward Jones' human resources office and told them that Boyer had resigned. Boyer also contacted Edward Jones' corporate human resources department. Edward Jones' associate relation's representative, Steve Rarick, told Boyer that the company considered her termination a voluntary resignation. (Rarick Dep. at 76-78).

Pavlik and Kadlecek were scheduled to open their own Edward Jones office in North Platter, separate from Robinson's office, on February 16, 2000. However, after boyer left the office on February 14, 2000, Pavlik suggested to Kadlecek that she apply for Robinson's vacant office administrator position because Kadlecek would have an opportunity to receive significantly greater compensation with Robinson than with Pavlik due to his greater volume of business. (Kadlecek at 38-41). Though she was initially reluctant to apply for

Boyer's former position, Kadlecek did apply and was given the job.

Boyer and Kadlecek both testified in their depositions that, from time to time, Boyer expressed her desire to retire from Edward Jones, Boyer was 55 years old (Filing No. 1).

SUMMARY JUDGMENT STANDARD

The Court must examine the record in the light most favorable to the nonmoving party i n the context of a summary judgment motion. *U.S. ex rel. Quirk v. Madonna Towers*, Inc., 278 f.3d 765, 767 (8th Cir. 2002). The proponent of a motion for summary judgment "bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v.*

Catrett, 477 U.S. 317, 323 (1986) (quoting Fed.R.Civ.P. 56(c)). The proponent need not, however, negate the opponent's claims or defenses. *Id.* at 324-25.

In response to the proponent's showing, the opponent's burden is to "come forward with 'specific facts showing that there is a genuine issue for trial.'" *Matsushita Elec. Indus. Co., v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (quoting Fed.R.Civ.P. 56(e)). A "genuine" issue of material fact is more than "some metaphysical doubt as to the material facts." *Id.* at 586.

Summary judgment is "properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" *Celotex Corp.*, 477 U.S. at 327. Nevertheless, the Court's function is not to weight the credibility and

persuasiveness of evidence in the context of a motion for summary judgment. *Kampouris v. St. Louis Symphony Soc'y*, 210 F.3d 845, 847 (8th Cir. 2000).

ANAYLSIS

COUNT 1: Claim for Wrongful Discharge

*5 Defendants' seek summary judgment on Boyer's claim that she was wrongfully discharged in violation of state law. Nebraska is an at-will employment state, and the Nebraska Supreme Court has held that an employer may terminate the employment of an at-will employee at any time with or without reason without incurring liability, provided that such action is not constitutionally, statutorily, or contractually prohibited. *See, e.g.* *Walpus v. Milwaukee Elec. Tool Corp.*, 248 Neb. 145, 532 N.W.2d 316, 322 (Neb. 1995). While acknowledging that Nebraska recognizes oral contracts, the Defendants contend that because

Boyer cannot demonstrate that her alleged verbal agreement with Robinson had a definite term of duration, the agreement is not a legal contract such that it would take her out of an employee-at-will status. *Hamersky v. Nicholson Supply Co.*, 246 Neb. 156, 517 N.W.2d 382 (Neb. 1994) (holding that promise of employment "until [employee's] retirement" was promise of employment for an *indefinite* term and therefore, the employee could be terminated at any time without employer liability), and *Goodlet v. Blue Cross & Blue Shield, Inc.*, 234 Neb. 5, 449 N.W.2d (1989) (holding that when employment is not for a definite term, there are no contractual or statutory limitations on the right of discharge.)

The Court is persuaded that there are no genuine issues of material fact at issue with regard to the duration of employment "agreement" that Boyer and Robinson discussed. Considering the

facts in the light most favorable to Boyer as the nonmoving party, she was intending to remain employed by Edward Jones "until Boyer decided to retire." Under Nebraska law, that statement is insufficient to create a definite term of employment. Accordingly, under Nebraska law there is not contract that would remove this case from an employment-at-will analysis.

Boyer argues that the Defendants are estopped from discharging her based on the holding in *Goff-Hamel v. Obstetrician & Gynecologists, Inc.*, 256 Neb. 19, 588 N.W.2d 798 (Neb. 1999). The Court disagrees. There is nothing in the record before the Court that demonstrates the kind of detrimental reliance necessary to state a claim based on the promissory estoppel exception to the employment-at-will doctrine set forth in *Goff-Hamel*. In Goff-Hamel, the plaintiff quit her job of more than 10 years in order to accept the offer of

employment with the defendant in that case. Several of ther terms of her new employment were negotiated, although the term and duration of her employment were not. The Nebraska Supreme Court held that the plaintiff was allowed to assert a theory of promissory estoppel in connection with the offer of at-will employment. *Id.* at 804. The facts surrounding Boyer's case are distinguishable from Goff-Hamel because Boyer did not resign her former employment based on the promise of employment with Edward Jones. Rather, she as already unemployed, having been laid off when her former employer went out of business. That she chose the Edward Jones' position over other positions because of a "promise" of better benefits and the hope of employment until she retired does not sufficiently demonstrate how her acceptance of that Edward Jones' offer worked to her detriment. To now argue that she passed up preferable employment

elsewhere to accept the Edward Jones' offer is speculative based on the record before the Court. For these reasons, the Court will grant Defendants' motion for summary judgment on the wrongful discharge claim.

COUNT II: Claim for Tortious Interference with Employment Contractual

*6 As a preliminary matter, the Court notes taht it previously dismissed the Defendants' Motion to Dismiss Count II of Plaintiff's Complaint as moot based on Boyer's amendment of her original Complaint. The Defendants asked the Court to reconsider its denial of their motion to dismiss (Filing No. 41), which the Court now denies, based in part of the reasons that follow.

The Defendants contend that Boyer's claim for tortious interference with an employment contract should be dismissed because there is no evidence that Robinson, against whom this claim is

solely alleged, interfered with Boyer's employment for any reason other than a lawful purpose of the employer. *See* *Huff v. Swartz*, 258 Neb. 820, 606 N.W.2d 461, 466 (Neb. 2000). Defendants contend that there is no evidence in the record that Robinson acted in furtherance of some individual or private interest in discharging Boyer.[FN2] The Court disagrees, and concludes that there are genuine issues of material fact relative to Robinson's purpose in his dealings with Boyer relative to her discharge from employment. Boyer has presented evidence that Robinson urged her not to claim overtime because payment of her overtime affected his personal income and profitability. In addition, a reasonable inference could be mad e that Robinson felt bound to his "agreement" to pay Boyer ten percent of his trimester profitability bonuses, but that he may not have felt compelled to pay Kadlecek a similar percentage. Given this disputed evidence,

the Court concludes that Robinson is not entitled to summary judgment on Boyer's tortious interference claim.

FN2. The Court recognizes that there are genuine issues of material fact regarding whether Robinson terminated Boyer or whether she voluntarily resigned.

Count III: Fair Labor Standards Act

Defendants also seek summary judgment on Boyer's claim that the Defendants have violated her rights under the Fair Labor Standards Act, 29 U.S.C. § 206 et. seq. ("FLSA"). The Fair Labor Standards Act requires that non-exempt employees be paid minimum wage, and generally, time-and-a-half for all hours over 40 hours worked in one week. 29 U.S.C. §§ 206, 207. *See also Bouchard v. Regional Governing Board of Region V Mental Retardation Servs.*, 939 F.2d 1323, 1327 (8th Cir. 1991). Defendants contend that Boyer is estopped from

claiming a violation of the FLSA because she was instructed in 1997 by Edward Jones' human resources representatives to claim as overtime all time in excess of 40 hours per week that she worked,, and because all time cards that she submitted to Edward Jones after that time were verified by her as being accurate. (Boyer Dep. at 89-90, 95, and Ex. 3). However, the Court finds that there is a genuine issue of material fact remaining as to whether Robinson instructed Boyer, subsequent to the human resource representative's 1997 instruction, *not* to record the overtime that she worked because it was coming out of his profitability and income. If Robinson instructed Boyer consistent with Boyer's testimony, and if she in fact worked overtime that she did not claim because of his instruction, then Boyer may have a claim under the FLSA. Because there remain genuine issues of material fact relative to this claim, the Court denies

Defendants' motion for summary judgment on Count III.

Count IV: Age Discrimination in Employment under State and Federal Law

*7 Boyer contends that Edward Jones violated her rights under the Age **Discrimination** in Employment Act, 28 U.S.C. 621 et. seq. ("ADEA") and Nebraska's Act Prohibiting Unjust **Discrimination** in Employment Because of Age, 48 Neb.Rev.Stat. § 1001 *et. seq.* The Nebraska Supreme Court has construed Nebraska's age **discrimination** act consistently with the ADEA, *see* *Billingsley v. BFM Liquor Management, Inc.*, 259 Neb. 992, 613 N.W.2d 478 (Neb. 2000), and, therefore, the Court will consider Boyer's age **discrimination** claims under ADEA and the *McDonnell Douglas* burden-shifting analysis.

To demonstrate a prima facie case under the ADEA, Boyer must show: (1) she is within a

protected class; (2) she was qualified to perform the office administrator position; (3) she was subjected to adverse employment action by Edward Jones; and (4) she was relaced by a younger employee. *Britton v. City of Poplar Bluff*, 244 F.3d 994 (8th Cir. 2001). It appears that, at least for purposes of this motion, all elements of Boyer's prima facie case except for the third element are conceded.

With respect to the third element, Defendants contend that they are entitled to summary judgment because Boyer cannot demonstrate that Edward Jones' decision not to award her a full 10 percent of the 1999 trimester profitability bonus is an "adverse employment action," and that she cannot demonstrate that her discharge from employment was involuntary. With regard to termination as an adverse employment action,[FN3] the Defendants contend that the undisputed facts establish that Boyer resigned. The Court disagrees and finds that

there are material facts in dispute regarding whether Boyer was voluntarily or involuntarily discharged, based upon the differences between Boyer's recollection of the vents surrounding the discharge and Robinson's recollection of those facts. (*Cf.* Boyer Dep. at 186-191 to Robinson Dep. at 220-21); *see also* Armstead Dep. at 14-17 and Ex. 102).

FN3. With regard to the bonus, Defendants argue that Boyer admitted that she knew the trimester profitability bonuses were wholly discretionary (Boyer Dep. At 83, 85, 87, 278) and that based on *Rabinovitz v. Pena*, 89 F.3d 482 (7th Cir. 1996), her loss of a portion of that bonus does not constitute an adverse employment action. It is true that the Seventh Circuit Court of Appeals has held that the "loss of a bonus is not an adverse employment action in a case . . . where the employee is not automatically entitled to the

bonus." *Rabinovitz*, 89 F.3d at 488-89.

However, because there are genuine issues of material fact remaining as to the nature of the bonus and whether it was "automatic" or not, this issue shall be tried.

If the Court assumes for purposes of this motion only that Boyer can successfully demonstrate her prima facie case, then the Court may inquire into Edward Jones' stated reason for her discharge. Edward Jones states that Boyer told them that she had resigned, and that she was discharged for this reason. However, given the differences between Boyer's testimony and Robinson's testimony relative to their final meeting, and the fact that Robinson was Boyer's supervisor at Edward Jones, the Court concludes that genuine issues of material fact remain for trial.

In addition, the following disputed facts weigh against granting summary judgment in this case: (1)

that Robinson allegedly inquired into Boyer's age at the time of her hiring, and again in January before her termination (Boyer Dep. at 63, 164); (2) that Kadlecek made a comment to Boyer about taking over Boyer's job without their supervisors' approval; (3) that a 32-year-old was immediately hired into Boyer's position; and (4) that Boyer made inconsistent statements to the Edward Jones human resources representative. Because the Court finds many material facts are genuinely disputed, Defendants' motion for summary judgment on the state and federal claims of age discrimination are denied.

*8 For all the reasons provided in this memorandum,

IT IS ORDERED:

(1) Defendants' Motion for Reconsideration (Filing No. 41) is denied;

(2) Defendants' Motion for Summary

Judgment (Filing No. 54) is granted in part and denied in part. Defendants' motion is granted as to Plaintiff's claim that she was wrongfully discharged as stated in Count I; and it is denied as to the remaining allegations of the Amended Complaint;

(3) Plaintiff's Motion in Limine (Filing No. 67) is denied without prejudice to reassertion at a date closer to trial, consistent with the Court's order of September 23, 2002 (Filing No. 70); and

(4) Defendant's Motion for Leave (Filing No. 68) to file a motion in limine out of time is granted, consistent with the Court's order of September 23, 2002 (Filing No. 70).

D.Neb., 2003

Boyer v. Edward D. Jones & Co. L.P.

Slip Copy, 2003 WL 25693573 (D.Neb.)

(3)

FEB 5 - 2010

No. 09-839

IN THE

Supreme Court of the United States

SYBLE HOOD
AND TOM H. WHITESIDE,

Petitioners,

v.

EDWARD D. JONES & CO., L.P.
AND ROBBY ROGERS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
EIGHTH COURT OF APPEALS OF TEXAS

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Have the Petitioners met their burden under Rule 14.1(g)(i) of the Rules of this Court in specifying the time, place, manner and disposition of the federal questions allegedly raised in the proceedings below?

2. Does certiorari jurisdiction exist where Petitioners did not raise a federal due process challenge to the trial court's discovery rulings until a Motion for Rehearing was filed with the Texas Supreme Court which, in turn, summarily denied said motion and did not expressly address the purported federal issue?

3. Have the Petitioners identified any considerations warranting review of their Petition under Rule 10 of the Rules of this Court and do any such considerations exist?

CORPORATE DISCLOSURE STATEMENT

Respondent Edward D. Jones & Co. L.P., a Missouri Limited Partnership, is not a subsidiary or affiliate of a publically held company. No publically owned company owns 10% or more of the general and/or limited partnership interests of Edward D. Jones & Co., L.P.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
STATEMENT	1
REASONS FOR DENYING THE PETITION	4
A. The Petitioners Have Failed To Carry Their Burden In Demonstrating That The Federal Issues Sought To Be Determined By This Court Have Been Properly Raised In The Proceedings Below, As Is Required Under Rule 14.1(g)(i) of the Rules of This Court.	4
B. This Court Lacks Jurisdiction Over The Instant Proceeding, In As Much As The Federal Issue Was Untimely Raised For The First Time On The Petitioner's Motion for Rehearing And Was Not Expressly Decided By The Texas Supreme Court.	6

Contents

Page

C. Petitioners Have Not Identified Any of The Considerations Required Under Rule 10 Of The Supreme Court Rules, Nor Are Any Such Concerns Present Here. 7

CONCLUSION 12

TABLE OF AUTHORITIES

Page

OPINIONS OF THIS COURT

Adams v. Robertson, 520 U.S. 83 (1997) 2, 4

American Surety Co v. Baldwin, 287 U.S. 156 (1932) 6

Consolidated Turnpike Co. v. Norfolk & O.V.R. Co., 228 U.S. 326 (1913) 2, 3, 6

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) 6, 7

Forbes v. State Council of Va., 216 U.S. 396 (1910) 6, 7

Godchaux v. Estopinal, 251 U.S. 179 (1919) ... 6

Hanson v. Denckla, 357 U.S. 235 (1958) 6

Johnson v. California, 541 U.S. 428 (2004) 5

McCorquodale v. Texas, 211 U.S. 432 (1908) ... 6, 7

Radio Station WOW v. Johnson, 326 U.S. 120 (1945) 6

Simmerman v. Nebraska, 116 U.S. 54 (1885) .. 6

Smith v. City of Jackson, 544 U.S. 228 (2005) 8

Wills v. Texas, 511 U.S. 1097 (1994) 6

Authorities

Page

OPINIONS OF THE COURTS OF THE STATE OF TEXAS

Hood v. Edward D. Jones Co., L.P., 277 S.W.3d 498 (Tex.App.–El Paso 2009, pet denied) 9, 10

Granada Corp. v. First Ct. of Appeals, 844 S.W.2d 223 (Tex. 1992) 10

STATUTES, RULES AND OTHER MATERIALS

28 U.S.C. § 1257 ..... 4, 7

TEX. LAB CODE § 21.001 *et seq.* 8

SUP. CT: R. 10 ..... 3, 7, 8, 12

SUP. CT. R. 14 ..... i, 2, 4

SUP. CT. R. 15 2

Tex. R. Evid. 503 10

STATEMENT

The tortured history of this case spans over ten years and three presidencies, and yet at the heart of Petitioners numerous appeals and now Petition for Writ of Certiorari rests a relatively simple state-law discovery dispute. Though the issues presently before the Court were not properly raised in the proceedings below, Petitioners contend that they were denied procedural due process in as much as: (1) Petitioner Hood was not permitted to conduct a wider breadth of written discovery in support of her state-law disparate impact age discrimination claim; and (2) the Court of Appeals declined their invitation to abrogate the attorney-client privilege simply because there was – at best – a slight discrepancy between a summary judgment affidavit and the trial testimony of a witness. Curiously, Petitioners make little argument in support of the questions they present to this Court, but have rather spent the balance of their Petition discussing a perceived bias within the appellate judiciary of the State of Texas. Yet even when pontificating on this extraneous political issue, and aside from the customary *ad-hominem* attacks on opposing counsel (a common theme throughout the Petitioners' many appeals), little mention is made of how, precisely, an alleged "ultra-conservative" state appellate judiciary has anything to do with the proverbial "price of tea in China."

Respondents would generally adopt the recitation of facts contained within the two opinions of the Eighth Court of Appeals of Texas, and would object to the extent that the purported facts within Petitioner's Statement

are inconsistent therewith. (Pet. App. G and H). Needless to say, the opinions rest entirely upon state law grounds, and do not dispose of any federal question.

Respondent's Brief in Opposition will concentrate primarily upon their obligations under Rule 15(2) of the Rules of this Court to address misstatements of the record and what issues would be properly before the Court in the event that certiorari was granted. To this end, Respondents would begin by noting that Petitioners have failed to comport with their obligations under Rule 14.1(g)(i) of this Court in identifying the trial and appellate disposition of the federal issue sought to be determined, so as to provide this Court with sufficient information to enable it to determine whether, under the circumstances, the exercise of certiorari jurisdiction is appropriate. In as much as Petitioners have failed to carry their burden of demonstrating that the federal due process question was properly presented in the courts below, this Court should decline to exercise jurisdiction. *Adams v. Robertson*, 520 U.S. 83, 90 (1997).

In fact, the Petitioners did not raise their purported due process issue until their respective Motions for Rehearing were filed with the Texas Supreme Court on June 29, 2009. As evidenced by Appendix M and N, the Texas Supreme Court summarily denied the Petitioners' Motions for Rehearing, and the Orders contain no language indicating that any federal question was considered or disposed of. (Pet. App. M and N). This case is therefore squarely within the ambit of the decision of this Court in *Consolidated Turnpike Co. v. Norfolk & O.V.R. Co., which* held that no certiorari jurisdiction from a final state court judgment will lay

when a federal question is raised for the first time on a motion for rehearing and where that court did not expressly decide the federal issue. 228 U.S. 326, 333-34 (1913). Consequently, it would appear that this Court lacks jurisdiction to entertain the Petitioners' case.

As a further matter, this Court has carefully crafted its Rule 10 to identify for would-be petitioners the legal concerns relevant to any decision by this Court to exercise certiorari jurisdiction. To this end, Petitioners have failed to address how, precisely, the instant case falls within this Court's conflicts jurisdiction, or why the decision of the court below concerns a question of significant federal import warranting the exercise of certiorari jurisdiction. Moreover, Respondents would show that Petitioners' tautological discourse respecting post-judgment discovery of privileged matters and their obtuse arguments pertaining to the scope of discovery of statistical information in a state-law disparate impact age discrimination claim present no such federal concerns.

REASONS FOR DENYING THE PETITION

A. The Petitioners Have Failed To Carry Their Burden In Demonstrating That The Federal Issues Sought To Be Determined By This Court Have Been Properly Raised In The Proceedings Below, As Is Required Under Rule 14.1(g)(i) of the Rules of This Court.

Under the conditions presently before this Court, this Court has resolutely refused to consider reviewing the decisions of state courts under the aegis of 28 U.S.C. § 1257, where the federal claim was not "addressed by or properly presented to the state court that rendered the decision" for which review has been requested. *Adams*, 520 U.S. at 86. Consequently, the Rules of this Court require that a petitioner must specify,

> both in the court of first instance and in the appellate courts, when the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by those courts; and pertinent quotations of specific portions of the records or summary thereof, with specific reference to the places in the record where the matter appears . . . so as to show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari.

SUP CT. R. 14.1(g)(i). The Rules of this Court thus place an affirmative burden on the petitioner to demonstrate

the existence of certiorari jurisdiction. *See Johnson v. California*, 541 U.S. 428, 431 (2004).

Petitioners purported Statement of the case may be found on pages 2 through 31 of their Petition for Writ of Certiorari. Needless to say, the Petitioner's Statement contains no reference, beyond the relief requested from this Court, to any federal due process challenge mounted against the trial and/or appellate court's discovery rulings within the proceedings below. Moreover, there is nothing within the Petition filed with this Court or in Petitioners' Petition for Writ of Certiorari Appendix that would indicate actual consideration and/or disposition by the trial and/or appellate courts of any due process challenge to any discovery ruling mounted by the Petitioners[1]. Accordingly, because they have failed to carry their burden in demonstrating the existence of certiorari jurisdiction, as is required by the Rules of this Court, this Court should deny Petitioners' Petition.

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1. As previously stated, the Petitioners did, in fact, raise a federal due process challenge to the trial court's discovery rulings, but did so only within their Motions for Rehearing before the Texas Supreme Court. The Texas Supreme Court summarily disposed of the Motions without a substantive discussion of their merits. For the reasons set forth in part B, *infra*, this is insufficient to establish certiorari jurisdiction.

B. This Court Lacks Jurisdiction Over The Instant Proceeding, In As Much As The Federal Issue Was Untimely Raised For The First Time On The Petitioner's Motion for Rehearing And Was Not Expressly Decided By The Texas Supreme Court.

In *Radio Station WOW v. Johnson*, Justice Frankfurter succinctly stated the general proposition that "[q]uestions first presented to the highest court on a motion for rehearing come too late for consideration." 326 U.S. 120, 128 (1945) citing, *Simmerman v. Nebraska* 116 U.S. 54 (1885); *Godchaux v. Estopinal*, 251 U.S. 179 (1919); and *American Surety Co v. Baldwin*, 287 U.S. 156 (1932) see also *Hanson v. Denckla*, 357 U.S. 235, 243 (1958); and *Wills v. Texas*, 511 U.S. 1097 (1994) (O'Connor, J. concurring). While this rule is not absolute, the holdings of this Court require that in order to establish certiorari jurisdiction in this context, the state court must "actually entertain[ ] and decide[ ] the federal question, and this appears of record . . ." *Consolidated Turnpike Co.*, 228 U.S. at 333-34. In this vein, a state court's disposition of a federal issue raised for the first time on a motion for rehearing which stated that a majority of that court did not consider a particular statute to be at odds with the First Amendment provided a sufficient basis for the exercise of certiorari jurisdiction. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 476 (1975). On the other hand, conclusory statements by a state court to the effect that a federal issue, raised for the first time on rehearing, was fully considered and denied does not provide a sufficient basis for the exercise of certiorari jurisdiction. *Forbes v. State Council of Va.*, 216 U.S. 396, 399 (1910); *McCorquodale v. Texas*, 211 U.S. 432, 436-437 (1908).

As previously stated, the Petitioners did not raise their due process challenge to the trial court's discovery rulings until Motions for Rehearing were filed with the Texas Supreme Court. The Orders disposing of these Motions are contained within Petitioners' Appendix M and N. The aforesaid Orders provide only that the Petitioners' respective Motions for Rehearing were denied and state no basis or otherwise provide any indication that the Texas Supreme Court actually entertained and decided the Petitioner's purported federal question. Therefore, the Orders are more akin to those at issue in *Forbes* and *McCorquodale*, than that addressed in *Cohn*. Consequently, Petitioners have failed to timely raise their due process claim in the proceedings below and this Court lacks jurisdiction under 28 U.S.C. § 1257.

C. Petitioners Have Not Identified Any of The Considerations Required Under Rule 10 Of The Supreme Court Rules, Nor Are Any Such Concerns Present Here.

Rule 10 identifies the considerations relevant in determining whether or not this Court will review a particular matter on a writ of certiorari. SUP CT. R. 10. In as much as this Petition is taken from the judgment of a state court, the concerns relevant here are addressed in Rules 10(b) and (c). Each of these grounds require the existence of an important question of federal law that a state court has actually decided. *Id.* The concerns addressed in subdivision (b) also require that a state court has decided an important question of federal law in a way that conflicts with another state court of last resort or with a United States court of

Appeals. *Id.* Subdivision (c) requires that a state court has decided an important federal question that has not been decided by this Court, but should be, or was otherwise decided in a manner which conflicts with the relevant decisions of this Court. *Id.*

Petitioners' Petition is bereft of any reference to Rule 10 or, for that matter, any notation to the Rules of this Court at all. Moreover, even with a liberal construction Petitioners' Petition does not address any concern identified by the applicable provisions of the Rule. For instance, throughout the forty-two page Petition, the term "Due Process" is referenced less than ten (10) times. Further, Petitioners engage in no substantive discussion of any case applying federal due process standards to a state court's discovery rulings regarding a state-law age discrimination claim.[2] As addressed in subsection A *supra*, Petitioners make no reference to any federal question that was ***actually decided*** by any of the courts below, nor do they identify any decision of any state court of last resort, Federal Court of Appeals, or decision of this Court which is in conflict therewith.

The only argument that Petitioners make that could potentially fall within the ambit of Rule 10 are their wild

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2. Pursuant to their Table of Authorities, Petitioners do cite to the case of *Smith v. City of Jackson*, 544 U.S. 228 (2005), on two occasions; however this case was decided under the Federal Age Discrimination in Employment Act and did not concern discovery issues per se. On the other hand, Petitioner Hood brought her claim under Chapter 21 of the Texas Labor Code and challenged the rulings made by the Court's below under the Texas Rules of Civil Procedure. TEX. LAB CODE § 21.001 *et seq.*

accusations of bias within the appellate judiciary of the State of Texas. Respondents strongly object to this characterization of the judiciary, and will not lend any credence to these accusations by responding to them as such. Suffice it to say, Petitioners have failed to identify any particularized harm they have suffered as the result of any prevailing conservative attitude among the Texas appellate judiciary, and especially that of the Eight Court of Appeals in El Paso. Moreover, the issue of the impartiality of the tribunals below was not timely raised, nor is it even framed within the questions presented for review to this Court.

Simply put, and despite all the window dressing, the Petitioners' claims concern garden variety discovery disputes that were decided by the trial and appellate courts in accordance with and pursuant to the Texas Rules of Civil Procedure. Petitioner Hood claims that although she was provided a company-wide list of all the names of all of the employees discharged by Respondent Edward D. Jones & Co., LP over the age of 40 for a ten year period, she was denied subsequent discovery over the same ten year period with respect to human resources analyses and other statistical data. However, Petitioner Hood fails to explain why she would be entitled to this information in light of the Respondent's objections to the breadth and scope of the request. Moreover, and as noted by the El Paso Court of Appeals, Petitioner Hood failed to marshal and utilize the materials that were produced that could have demonstrated trends which, in turn, might have bolstered her arguments and permitted her to overcome the Respondent's objections. *Hood v. Edward D. Jones Co.*, L.P., 277 S.W.3d 498, 504 (Tex.App.–El Paso 2009, pet denied).

As to their second contention, Petitioners contend that they should have been permitted to traipse through the Respondent's privileged files on the purported basis of the crime-fraud exception under Rule 503(d)(1) of the Texas Rules of Evidence in order to obtain alleged evidence in support of a premature Motion for Sanctions.[3] This request was premised upon "seemingly fraudulent" affidavits tendered in support of a Motion for Summary Judgment filed by Respondent Rogers. According to Petitioners, the "seemingly fraudulent" portion of the affidavit was a statement to the effect that Rogers had sole management control (a term of art) over the brokerage at issue when testimony elicited at trial indicated that he was required to have his decisions respecting the hiring and firing of employees ratified by Respondent Edward D. Jones & Co, LP's human resources department. As stated by the Court of Appeals, this is at very best a minor discrepancy in the testimony, and Petitioners had ample opportunity to cross examine and exploit this apparent weakness. *Hood*, 277 S.W.3d at 504.

Texas Law provides that in order to defeat the privilege under the crime-fraud exception, the opponent must make a *prima facie* showing of a contemplated fraud. *Granada Corp. v. First Ct. of Appeals*, 844 S.W2d 223, 277 (Tex. 1992). The rule does not provide that the party seeking to circumvent the privilege be given an opportunity to first conduct discovery of privileged materials and then make a *prima facie* showing, as is

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3. Petitioner Whiteside, counsel for Petitioner Hood, in fact admitted that he had no evidence in support of the Motion for Sanctions. *Hood*, 277 S.W.3d at 504.

argued by Petitioners. Otherwise, there would be no attorney privilege, as litigants would always do as Petitioners have done here, crying foul at the most minor of alleged inconsistencies in testimony, and following an adequate time in which to slander opposing counsel, begin demanding the turn-over of privileged files. To the contrary, however, the party seeking to avoid the privilege under this exception must make their *prima facie* case at first instance, or not at all. In this case, under the most favorable interpretation, Petitioners could point only to a slight aberration in testimony, which cannot possible carry their unquestionably heavy burden to defeat the privilege.

CONCLUSION

In sum, Petitioners have failed to carry their burden of establishing a basis for the jurisdiction of this Court as is required under the applicable Rules. Moreover, due to Petitioners failure to timely raise a federal question, this Court lacks jurisdiction to entertain Petitioners Hood's and Whiteside's Petition. Moreover, Petitioners have failed to identify any of the concerns required in Rule 10 of the Rules of this Court that would otherwise warrant discretionary review and no such concerns, in fact, exist. Accordingly, Respondents would request that the Petition be denied.

Respectfully submitted,

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